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In The

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1972)

No. 72-879

NCR EMPLOYEES' INDEPENDENT UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed and granted enforcement to part of an order of the National Labor Relations Board. In this behalf, Petitioner shows unto this Court:

OPINIONS BELOW

The decisions and opinion of the United States Court of Appeals for the Sixth Circuit are attached hereto as Appendix A. The order and opinion of the National

Labor Relations Board (190 NLRB No. 117) is attached hereto as Appendix B. The trial examiner's decision is attached hereto as Appendix C.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Court of Appeals ordered enforcement of the National Labor Relations Board order on August 18, 1972. Petition for Rehearing filed by Petitioner was denied by order of the Court on September 19, 1972.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari are Section 1254 of Title 28 U.S.C.A., which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari and Section 10 (c) of the National Labor Relations Act, which provides that judgments of the Court of Appeals with respect to unfair labor practice cases shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

In this cause the Petitioner argues that the Court below and the National Labor Relations Board misinterpreted and misapplied Section 8 (b) (1) (a) and Section 10 (c) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Does our national labor policy allow unions to devise internal programs, designed to cooperate with the U.S. Defense Department and with the employer, to maintain military production during a strike, by issuing employees picket line passes in exchange for contributions to the union, where there is no union sponsored program of collection or enforcement by coercion or intimidation?

2. Is it contrary to law a) to require the union to reimburse the union members and other employees who made weekly contributions to the union, in exchange for picket line passes, absent evidence that the payments were "involuntary" and caused by union sponsored coercion? b) to require the union to pay the wages "lost" by employees who did not work during the strike because the employer unilaterally, and not in response to any union request, required picket line passes as a condition of employment during the strike?

Petitioner says the answers to the above questions is "yes".

STATEMENT OF THE CASE

Petitioner NCR Employees' Independent Union (EIU) was the bargaining representative for 14,000 employees of the National Cash Register Company in Dayton, Ohio.[1]

On November 19, 1968, the union sanctioned an economic strike.

At that time NCR performed critical military research work, vital to the war effort in Viet Nam. U.S. Defense Department officials requested that the union and company keep NCR's small military division operating during the strike.

The union agreed to cooperate with the government and permit the 140 military division employees to work, in spite of the strike.

To appease the employees who were not working and help finance the strike, the union asked the military division employees to contribute one-third of their wages to the union. Employees who signed a form, agreeing

[1] The union was displaced by the UAW in 1970 and the EIU now represents only about 100 NCR employees in Monroe, Ohio.

to these payments, were issued picket line passes. Upon making contributions, the passes were renewed on a weekly basis.

The first few days of the strike were tumultous. There was some mass picketing directed at several thousand supervisors, management employees, members of other unions and other non-bargaining unit employees, all of whom worked during the strike.

The union had never conducted a strike before and was unable to prevent rank and file strikers from engaging in mass picketing.

On November 22, 1968, the company was concerned over the safety of its military division employees and decided not to permit them to work unless they had a pass from the union.

On November 23, the company obtained a temporary restraining order against the union, enjoining mass picketing.

After the first week of the strike, there was no violence or mass picketing directed towards military division employees. Some of the buildings where military division employees worked were never picketed. The union made no effort to police the wage contribution program or verify the accuracy of the contributions.

Peaceful pass checking by pickets continued on a "sporadic" basis during the last three weeks of the strike.

133 military division employees worked during the strike and made contributions to the union totaling in excess of $15,000.00. Seven employees refused to obtain passes and did not work.

The Board found the union guilty of a violation of 8(b) (1) (a) of the Act. The Board ordered the union

to reimburse the 133 employees and to pay the lost wages of the seven employees who did not work.[2]

The Court of Appeals, like the Board, noted that a voluntary contribution program was permissible and did not condemn "peaceful" non-coercive pass checking. However, the Court found there were "threats, intimidation, incidents of violence, blocking of ingress and egress" which were "coercive". The Court did not find that the union actively sponsored the picket line violence, but held that there was "silent approbation" of misconduct by the union which amounted to "an unacceptable means" of enforcing its contribution program.

The Court found the employer guilty of an 8(a)(1) violation by denying work to employees who refused to obtain a union pass. The Court conceded that the Company's discrimination was unilateral and not a result of a specific union demand.[3] However, the union was held liable for back pay because its alleged "silent approbation" of coercive picket line activity was construed to be the indirect and "but for" cause of the employer discrimination.[4]

None of the witnesses testified as to any specific incident of violence directed toward any of the named individual 133 employees who made contributions to the union.

The Court conceded that the reimbursement order may result in a "windfall to a lot of old time union men" and suggested that the Board should perhaps "have explored

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[2] The company was held jointly liable for the back pay and was held secondarily liable for the reimbursement of contributions.

[3] The trial examiner also held "it was the employer's action that was immediately responsible for the company policy of no pass - no work".

[4] One Board member dissented from the order holding the union jointly liable for the back pay.

means of determining which employees were actually coerced". However, the Court held the burden should not be on the General Counsel to show that each employee was coerced. The Court placed the burden upon the union to show that each employee made his contributions without being intimidated by the union.

FORM IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED HERE WERE RAISED BELOW

Federal questions herein were raised in the petition in the United States Court of Appeals and in the briefs before that Court. These questions related to interpretation of Sections 8 (b) (1) (a) and 10 (c) of the National Labor Relations Act.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Sixth Circuit below decided federal questions of substance contrary to law in that the Court, in interpreting and applying the National Labor Relations Act:

a. Erroneously held that a union's program to assist the United States Defense Department in the war effort, by issuing picket line passes to military division employees who made financial contributions to the union, was a violation of Section 8 (b) (1) (a) of the Act.

b. Erroneously held that the order requiring the union to reimburse contributions and pay "lost" wages of non-working employees was a proper remedy under Section 10 (c) of the Act.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THE POLICY OF THE ACT AS SET FORTH IN ALLIS-CHALMERS.

In *NLRB* v. *Allis-Chalmers*, 388 U.S. 175 (1967), this Court upheld a union's right to punish strike breakers by stiff fines.[5] The purpose of fines is to restrain employees from exercising their right to work. The threat of a fine is no less "coercive" than the fear of encountering harrassment in getting through a picket line. In the case at bar, the union could have imposed a $25.00 a day fine on working members or could have requested an "assessment" from employees equivalent to one-third of wages, enforcible by voluntary check off or by union discipline and suit. We do not understand how the involuntary fine system designed to prevent employees from working and condoned in *Allis-Chalmers* is permissible whereas the voluntary contribution program, designed to encourage employees to work, is coercive.

In *Allis-Chalmers* and *Scofield*,[6] this Court reiterated that Section 8(b)(1)(a) was "not meant to regulate the internal affairs of unions." The Court, in cases of this nature must balance the "legitimate union interests" against any countervailing "statutory labor policies". In the case at bar, the wage contribution program furthered the following legitimate interests: 1. Cooperation with the United

[5] The NLRB holds that even the imposition of "unreasonable" exorbitant fines for crossing a picket line is not an 8(b)(1)(a) violation. *International Assn. of Machinists Lodge 504*, 185 NLRB No. 22 (1970).

[6] *Scofield* v. *NLRB*, 394 U.S. 423 (1969).

States Defense Department. 2. Cooperation with the employer. 3. Mutual aid and protection in the furtherance of an economic strike. 4. Financing of the strike. 5. Appeasement of the non-working strikers and prevention of further violence.

The EIU had no duty to consent to employees working. To the contrary, the union had every right to maintain an effective picket line and to discourage all employees from working. The union, by agreeing to cooperate with the government and NCR, was creating an economic benefit for the military division employees, not otherwise available. NCR did not attempt to operate its other EIU bargaining unit divisions during the strike. NCR never would have operated the military division, but for the union's pledge of cooperation. Having created a windfall benefit for the 140 employees not available to the other 14,000 employees, the union had a right to request a "price" for its picket line passes. Indeed, neither the Board nor Court overruled the leading case of *Youngstown Sheet and Tube,* 130 NLRB 1295 (1961), where the union supplied picket line passes in exchange for payroll deduction authorizations of $2.00 daily and the Board noted

> "the pickets at the plant gate were instructed that nobody would go through the line without a pass. I know of no case however that makes it a violation of the Act for a union official to instruct pickets to operate an effective picket line."

As stated in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953), "a wide range of reasonableness must be allowed a statutory representative in serving the unit it represents." The purposes of the program — to facilitate employees passing through the picket lines without embarrassment or harrassment; to insulate pass holders from union fines; to

raise strike funds; to appease non-working employees — were reasonable.

However, the Court and Board held that the union "utilized" "unacceptable means" to enforce its contribution program. The Court agreed there was no substantial evidence of union sponsorship of mass picketing, threats, etc. However, the Court found that the union "reaped the benefits" of the unauthorized mass picketing that took place during the first days of the strike, when the employees first signed the pledge cards. The Court also criticized the union for failing to formally disavow the picket line incidents and to restrain the pickets.

There were over 6,000 non-bargaining unit personnel not represented by EIU and not on strike. The mass picketing was not designed to harrass the tiny number of military division employees. In fact, there never were any pickets outside some of the buildings where military division employees worked. In addition, no employee witness testified as to any fear of violence, or any picket line harrassment directed towards military division employees. The holding that the union leadership utilized "coercion" as the "means of enforcement" of the contribution program required a tortured method of reasoning having insubstantial relationship to the record.

The strike began as an "unauthorized" strike. Union leadership did not initiate the strike. However, on November 19, the union did sanction the strike that was already in progress. The EIU never had conducted a strike in its 30 years of representing NCR employees. Company attorney Bradford testified:

> "they were somewhat disorganized . . . they had quite a number of people that they could not control. And —
>
> Q. By "they" you mean the union? The union leaders?

A. The union had no control over them" (JA 161a)[7] The Company was "hoping that the union would be able to control the pickets." (JA 162a) However, by November 22, it was clear the union could not control the mass picketing and blocking of entrances. On November 23, the Company obtained a temporary restraining order. The union obeyed the Court's order. However, some individual strikers continued to engage in picket line intimidation. About a week later the Company sought a contempt citation *not* against the union, which the Company felt was not guilty of misconduct, but against "one of the individual pickets".[8]

Thereafter, there was no illegal activity on the picket lines. Peaceful picketing and pass checking did continue on a "sporadic" basis (166JA).

Even if some employees felt pressured into signing the contribution forms because of the picket line incidents during the week of November 22, there was no reasonable basis for fear of violence during the last three weeks of the strike.[9] The union never actively attempted to enforce collection of the pledges. There was no attempt to check the accuracy of the amounts of money submitted by the employees. Most of the witnesses testified they made no payments to the union during the last week of the strike. The total amount received by the union — $15,000.00 — was closer to 15% of the gross than 33%, indciating the lack of enforcement.

Passes were issued on a weekly basis. The effects of any

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[7] References are to the Joint Appendix in the Court of Appeals.

[8] "the following week . . . officially as far as the union was concerned, they did, in fact, comply with the restraining order . . ." Brafford testimony (JA 165a).

[9] The strike terminated about December 16, 1968.

"coercion" occurring the first week, had been dissipated during the last weeks of the strike.

The union never requested the Company to deny work to non-pass holders. As far as the union was concerned, the picket line passes were only for the purpose of allowing the employees to avoid harrassment from employees whom the union could not control. There was no evidence of any deliberate union "call to arms" directed towards the handful of military division employees.

In spite of the absence of any effort of the EIU leadership to police and enforce its wage contribution program, the union as an organization was held to be engaged in "coercion".

The union's pledge of cooperation to the United States Defense Department was motivated solely by patriotic impulses. The union kept its bargain even though strikers who were without pay checks were bound to have been annoyed by the program. Now, as a reward for its cooperation in the war effort, the same U.S. government, through a different agency, brands the union as a law breaker. The 133 employees, received a windfall financial benefit. But for the union, they would not have received one dime during the four weeks of the strike. Yet the NLRB says the union prevented the employees from exercising their "right" to work without union restraint. The union's wage contribution program was a pragmatic solution to a difficult problem. The union was able to satisfy its pledge to the government and at the same time satisfy the legitimate objections of employees who did not work.

The union, in *Allis-Chalmers* embarked on a program of fines to prevent employees from working. The union, in this case, devised a program to enable employees to work by payment of a permit fee. The employees in *Allis-Chalmers* who did not pay were sued in civil court. The

employees in this case who did not pay were never bothered or even contacted by the union. To call the union's affirmative conduct in *Allis-Chalmers* legal, and the union's passive role in this case illegal makes no sense and contradicts the policy of the Act.

II.

THE REIMBURSEMENT AND BACK PAY ORDERS ARE "PUNITIVE" AND NOT REMEDIAL.

The Court of Appeals recognized in its opinion that "the Board cannot order reimbursement in the absence of proof that the funds would not have been paid but for the illegal coercion" and that the "Board does not have authority to impose sanctions solely for the purpose of deterring future violations of the Act." The leading case is *Local 60 United Brotherhood of Carpenters* v. *NLRB*, 365 U.S. 651 (1961), where assessments and work permit fees were collected "as the price employees paid in order to obtain or retain their jobs" under an illegal closed shop preferential hiring system. This Court refused to sustain the Board's order of reimbursement of dues, since there was no specific evidence of coercion with respect to the employees involved. Other lower court cases have been extremely reluctant to order reimbursement of illegally collected dues and permit fees in the absence of specific proof that the payments were not voluntary in nature. *NLRB* v. *Saltsman*, 283 Fed. 2d 472 (CA 6 1960), *NLRB* v. *Millrights Local 2232*, 277 Fed. 2d 217 (CA 5 1960), *NLRB* v. *U.S. Steel Corp.*, 278 Fed. 2d 896 (CA 3 1960), *NLRB* v. *Masters-Lake Success, Inc.*, 287 Fed. 2d 35 (CA 2 1961).

A leading case is *NLRB* v. *Food Fair Stores, Inc.*, 307 Fed. 2d 3 (CA 3 1962), where the union threatened that

employees would be discharged if they did not pay strike assessments to the union. The Court held that those who voluntarily signed check off authorization of assessments were not entitled to reimbursement. The threats were held to be independent of the voluntary authorizations unless there was proof in each case that the authorization was not in fact voluntary but coerced by threats.

All these cases cite the classic statement of the Court in *Morrison-Knudsen Co.* v. *NLRB,* 276 Fed. 2d 63 (CA 9 1960): "reimbursing a lot of old time union men by refunding their dues is not a remedial measure." In the instant case, there was abundant evidence that the contributions were unrelated to any "coercive" picket line incidents. For example, many military division employees testified they worked and never made any contributions. Employee Beam's testimony was typical:

> "Q. And were you worried about you or anyone else having any difficulty crossing the picket line without a pass?
> A. No, none whatsoever (JA 165)."[10]

Many employees testified that during the strike there never were pickets around buildings which military division employees worked (Special Projects Annex, (JA 119, Comer Building (JA 141), Building 26 (JA 158).

Even the Court and Board conceded that there was no violence during the last weeks of the strike and that any pass checking was peaceful and "sporadic".

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[10] Charging party Huesman testified he was never required to show a pass and with respect to the last week of the strike, "No one was requiring me to pay this fee and . . . I didn't pay it" (65-67ja) Springer testified no one ever threatened him even though he had no pass. Petry didn't pay because "this thing (the pledge card) said voluntary and I didn't feel (sic) to volunteer the money (107ja)." Martes said that she was told "if we didn't want to come back and get another pass we didn't pay" (126ja).

The Court erred by placing the burden of proof as to the "coercion" issue upon the union and by refusing to recognize that such burden had been satisfied as to contributions during the last weeks of the strike and for employees working at buildings where there were no pickets.

The Court below says the Board could infer that contributions would not have been made if there was no violence in the first week of the strike. We believe an equal inference is just as reasonable – that peaceful and sporadic picket line checks, which are not illegal, would have produced the same results. If the contributions are to be deemed "involuntary" the fault was the employer's, who unilaterally required passes in order to work, and never rescinded its policy during the last weeks of the strike.

In addition to the order of reimbursement of over $15,000.00 in contributions, the union was held liable for over $1,000.00 in "lost wages" for 7 employees who did not work because of the employer's refusal to allow them to work without a picket line pass. The Board and Court held that the employer had acted "unilaterally" in the absence of a specific union request, but affirmed the union's joint liability because of "the union's 'but for' responsibility for the discriminatory conduct of the employer."

The general rule is that a union is not held liable for loss of earnings damages where there is an 8 (b) (1) (a) violation involving interference with the right to ingress to the plant, *Progressive Mine Workers of America* v. *NLRB*, 187 Fed. 2d 298 (CA 7 1951), *Colonial Hardwood Flooring Company* v. *NLRB*, 84 NLRB 563 (1949). Section 10 (c) of the Act only authorizes back pay awards where the union is responsible for "discrimination". In this case the General Counsel's complaint alleged a violation of 8 (b) (2) of the Act. However, neither the trial examiner nor Board found discrimination on the part of the union.

Nonetheless the Court held it is not necessary for the union to be in violation of 8 (b) (2) for a back pay order to issue.

The ruling as to union's "causation" of the employer discrimination was not supported by the record. The union brought no pressure directed against the Company. Even if there was "silent approbation" of picket line incidents directed against employees, there was no evidence that the motive for the union's inaction was to force the Company to deny work to non pass holders. The Company's decision of "no pass – no work" was made because of its generalized fears of violence. The Company's decision was made without consultation or communication with the union and was not specifically related to any union pressures directed to military division employees. The record shows no hint of union condonation of the employer's discrimination. Even if there was union "but for" causation of the Company's original policy, it is unfair to blame the union for the Company's overcautious and unnecessary policy of continuing to require passes during the last three weeks of the strike.

Prior to this case, the Board never held a union responsible for unilateral violations by a company. Analogous situations are found in the construction industry. Often employers refuse to hire employees without a union card because of a generalized fear or belief they will alienate the union if they hire a non-union worker. A leading case is *United Construction Co.,* 169 NLRB No. 1 (1968). There the employer required an employee to obtain union clearance. The union refused to grant a permit to the individual but did not request the company to deny him employment. The employer's discriminatory refusal to allow him to work without a union permit was unilateral. The union was exonerated from any 8 (b) (1) (a) culpa-

bility. To the same effect see *Ironworkers Local 433*, 169 NLRB No. 87 (1968).

The decision of NCR on November 22, 1969, to send home employees without passes, was its own idea, motivated by its own concept of the situation. No union agent made any express or implied request that the company send home non-pass carrying workers.

To say the union, by remote control, signaled a desire that the Company discriminate is to speculate and conjecture far beyond the record. The record shows the contrary a — union lack of concern over "enforcement" of its picket line pass system and a total absence of any union efforts to get the company to help police or enforce the wage contribution program.

CONCLUSION

In this case the union, as an organization, acted in good faith in developing a reasonable program to assist the U.S. Defense Department. Without some sort of assessment-contribution arrangements, union cooperation was impossible and the Company never would have issued an invitation to work to the military division employees.

The order of reimbursement provides a "windfall" benefit to the 133 employees.

Even if there had been no mass picketing during the first few days of the strike, contributions would have been made. Loyalty to the union; sympathy for the strikers; patriotic motives; a desire to avoid union fines; a desire to avoid embarrassment at the picket lines — these were the important motives for the contributions. It is unfair to "infer" that the contributions were in fact involuntary, particularly with respect to 1) union members, 2) contributions collected in the last weeks of the strike when there

was no violence and 3) those who worked in buildings which were never picketed. To the extent any contributions were "involuntary", they were coerced by the employer's unilateral "no pass — no work" policy, which was maintained for the entire strike, long after any fear of violence had disappeared. To saddle the union with the primary financial responsibility for what was the employer's 8 (a) (1) violation is unfair. To require the union to reimburse contributions and pay "lost wages" is punitive and contrary to Section 10 (c) of the Act.

PRAYER

For the foregoing reasons Petitioner prays that a Writ of Certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the judgment of that Court and the order of the National Labor Relations Board may be reviewed by this Court and reversed with direction that the unfair labor practice charge be dismissed or in any event that the order of the Board be modified by revising enforcement with respect to the reimbursement and back pay orders.

Respectfully submitted,

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APPENDIX "A"

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-1454
No. 71-1508

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL CASH REGISTER EMPLOYEES' INDEPENDENT UNION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board.

Decided and Filed August 18, 1972.

Before: EDWARDS, CELEBREZZE, and MCCREE, Circuit Judges.

MCCREE, Circuit Judge. The National Cash Register Company (NCR) and the NCR Employees' Independent Union (EIU) petition for review of an order of the Na-

tional Labor Relations Board (NLRB or Board), and the Board cross-petitions for enforcement of its order. As modified by this opinion, the Board's order is enforced.

I. THE FACTS

In the fall of 1968, NCR and the EIU were negotiating over the terms of a new collective bargaining agreement to cover NCR's Dayton, Ohio, industrial complex, of whose 20,000 employees about 14,000 were members of the bargaining unit represented by the EIU.[1] During this period, NCR was performing certain work on military defense projects under contracts with the United States Government, and these contracts required NCR to notify the Government when "any actual or potential labor dispute . . . threaten[ed] to delay the timely performance" of these projects. When negotiations failed to produce an agreement, on October 30, 1968, NCR notified the Government of the possibility of a strike. Thereafter, Government representatives obtained the assurances of both NCR and EIU officials that measures would be undertaken to enable employees of NCR's Military Division to work during any strike that might occur.

On Monday, November 18, 1968, a wildcat strike of EIU members began. The strike was authorized by the union later that day, and it resulted in a virtual shut-down of NCR's Dayton operations. On November 19, 1968, officials of NCR and of the EIU met to discuss allowing Military Division employees to work during the strike. NCR officials stressed the "need for continuing our defense production" and the "vital nature" of some of the defense projects, and the union officials agreed to issue passes to the Military Division employees to facilitate their

[1] We are informed by the EIU that its membership currently numbers about 100.

crossing the picket lines that had been set up by the union at most of the entrances to NCR's buildings. Company officials then telephoned the Military Division employees to notify them to come to work on November 20 and to instruct them to go to the union hall to obtain their passes.

Following the meeting between NCR and EIU officials, however, EIU president Withrow and secretary Taylor decided that the Military Division employees should be asked to contribute to the union one-third of the daily gross wages that they would earn while working during the strike. This proposal was approved by the union's executive board, and, concomitantly, the union leadership decided to suspend, with respect to the Military Division employees, enforcement of a local bylaw that established a $25 fine for any member who crossed a picket line during an authorized strike. Union officials Thomas Sturr and Edward Robbeleth testified that this procedure was adopted because the union had no other source of income at the time, the contribution was considered to be a "fair share" with respect to the strike effort, and, if it were adopted, EIU members would be less inclined to react violently on the picket line when Military Division employees crossed the line to work.[3]

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[3] The desire to avoid anticipated violence on the picket line was particularly stressed. Sturr testified:

> Q. And what did you tell those people? A. Well, I explained to them that this was being done for two basic reasons. First of all the fact that the union was cut off without any source of income during this period of time. And this, together with the fact that we felt a half a loaf was better than none, and that those who were permitted to work we felt it was no more than fair that they should contribute a chunk of their earnings, which we had established at a third, to the union.
>
> Secondly, due to the fact — and it was a known fact — that there were many of the strikers who objected to anyone at all working, that we felt it would be more palatable to those strikers if it were known that those who were allowed to work

On the evening of November 19, Military Division employees began reporting to the union hall to receive their passes. These employees, not all of whom were members of the EIU bargaining unit, were told at the hall by the union representatives who had been delegated to distribute the passes that to receive their passes, they would have to sign the following form:

> In recognition of the fact that I am being permitted by the NCR-EIU to work on my job at NCR during the period of time that an authorized strike is taking place, and further recognizing that the Union's Executive Board has recommended that voluntary contributions be accepted from all Union Members who are being permitted to work during this period, I hereby freely consent to pay one-third (33 1/3%) of my gross daily wages during this period, to the Union. In consideration of such contribution, it is my understanding that I am to be furnished authorization to cross the Union picket lines for the purpose of working at NCR during this period, and that I am obligated to obtain from the Union a new work authorization on or prior to Monday of each week, for the duration of the strike.

The employees were told that they would not be per-

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were contributing and in that way helping the efforts of the strike.

And it was for those two basic reasons, as I explained to everyone who asked me, that this is why we were doing it. And at the same time it was explained that we would issue a pass to facilitate their going through the picket line.

Robbeleth corroborated the concern about a possible violent reaction by EIU members:

> Q. And what was the purpose of giving people the pass? A. The purpose of giving them the pass that we had in mind I believe was twofold. One was identification of the personnel, that they were a group of employees that were permitted to work. And, two, as I said, to keep the violence that existed down to a minimum. And we felt that the pass would effectuate this.

mitted to cross the picket lines without signing these forms and were instructed that they could renew their passes each week only by paying one-third of the wages they had earned preceding each renewal period. Although only George Springer, a non-member of the EIU, testified that he was overtly threatened with physical violence if he attempted to cross the picket line without having signed this form and having received a pass,[3] all the employees who testified indicated that the union representatives conditioned the issuance of the passes upon the signing of the contribution form.[4] Some of the employees expressly

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Union secretary Taylor, when asked why the union decided to adopt the contribution procedure, responded that it was "[t]o help with the strike. And to appease the membership that didn't want anybody going across those lines."

[3] Springer testified that, when he arrived at the union hall, he was directed to a table at which a "union man" was issuing passes. This man was engaged in a discussion with three or four Military Division employees, and he handed Springer the contribution form to read and sign. When Springer indicated a reluctance to sign since he was not a member of the EIU, the "union man" stated, in the presence of the other employees, that the company did not know anything about the contribution form but that

> Well, the agreement between the company and the union is that you can go to work. But you are not going to work without this pass. And you won't get the pass unless you sign this paper.

According to Springer, he continued to object to signing the agreement:

> And I said, "Well, all I was interested in was what did the company want." And he said, "Well, don't worry about that. There are going to be some pretty big boys on that picket line."

[4] For example, Edward Huesman, the charging party in this case and not a member of the EIU at the time of the strike, testified that he was told at the union hall that he had to sign the contribution agreement to obtain a pass. When he objected, the union representative stated

> that I had to sign [the agreement] to get the pass in order to work and that he did not care if I worked or not. That he would

objected to signing the agreement. Of this group, some eventually decided to sign because of their desire to work;[5] others refused to sign and either stayed home for the duration of the strike,[6] subsequently agreed to sign and worked for part of the strike period, or attempted to work without having obtained a pass.[7] On the basis of this testimony,

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prefer that I didn't. That was his words. But if I was to work I had to sign this paper.

Richard Flanigan, also not a member of the EIU, testified that union official Sturr handed him a contribution form at the union hall on November 19 and told him, "Read this and sign it." After discussing the situation with some other Military Division employees, Flanigan decided to sign it even though he "didn't like it." Sturr then told him about the renewal procedure, and he allegedly stated, "If you don't want to come back in [to work the following week], don't come back [for a pass.]" Frederick Seeberg, a union member, signed the agreement on November 20, and he renewed it the following week because, he testified, "it was made, I felt, a condition to work; that I had to have a pass."

[5] For example, Elizabeth Rankey, not a member of the EIU at the time of the strike, testified that she went to the union hall on November 19 and that Sturr told her, after she objected to making the wage contribution, "Those men are out in picket and you're drawing a pay check. You're going to pay." She testified that she told Sturr that this was "blackmail," but that she eventually signed the form because she thought that this would help NCR perform important defense work. *See also* note 4 *supra* (testimony of Richard Flanigan).

[6] Don Kesinger, an EIU member, objected to paying one-third of his wages to the union and did not go to the union hall to obtain a pass. He did not work at all during the strike. Another EIU member, Elmer Houston, at first refused to sign the contribution agreement but then changed his mind on November 22 and signed. He worked only that day, and did not work for the remainder of the strike period.

[7] For example, Edward Dunn, an EIU member, refused to sign the contribution form during the first week of the strike but then changed his mind and signed for each week of the strike thereafter. His stated reason for signing was that he needed the money he would net after making the contribution. *See also* note 4 *supra*.

George Springer (*see* note 3 *supra*), after being threatened at the union hall, reported for work the next three days without a pass, but after November 22 he did not work for the duration of the strike.

the Trial Examiner concluded that "[s]tatements made by union agents to some of the employees who protested against signing the forms leave little doubt as to the coercise nature of the Union's action."

NCR officials did not learn of the union's intention to require a wage contribution as a condition for obtaining a pass until the evening of November 19, when Military Division employees began telephoning to inform them of this procedure. They assured the employees that the contribution was not part of the company-union agreement, and they told each employee who called that the decision whether to sign the document and come to work was his to make. Over the next few days, however, this "hands off" policy of the company changed as NCR officials became increasingly apprehensive about the safety of their employees. This concern was prompted by mass picketing that was occurring at most of the entrances to the NCR complex and by several incidents of threats or violence communicated to and witnessed by NCR officials.[8] By

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Richard Hill, an EIU member, testified that he went to the union hall on November 19, discovered that the union was seeking a wage contribution, and left the hall without signing the form. He worked for the next three days without a pass, but on November 22, after being sent home by the company (*see* text following note 9 *infra*), he went to the union hall and signed the agreement and received a pass. Robert Petry, also an EIU member, decided to sign the contibution agreement on November 20, but after he discovered that there was no picket line at his work entrance, he tore up the contribution form and went to work for the remainder of that week without a pass. On November 22, however, after being sent home by the company, he went to the union hall and signed the agreement again. Lloyd Hill, not a member of the EIU, refused to sign the agreement and came to work without a pass until November 22, when he was sent home by the company. He obtained a pass for the last week of the strike.

[8] These events were described by various witnesses at the hearing below:

Friday, November 22, company officials had become convinced that the situation was critical, and they determined

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Q. Did you ever see a roving band of people moving up and down the streets and pickets? A. The first day on Monday I believe there were. We looked out the window and saw the strikers roving down Main Street. But that's the only day I can recall seeing it. [Testimony of EIU member Donald Beam.]

. . .

Q. Did you notice particularly any violence around the picket lines on the morning of Friday, the 22nd? . . . A. Yes. I cannot pinpoint the day. But I know one day that I came in I went through Building 26. . . . There were several police cars and a group of them. . . .

Q. You saw the police cars and an unusually larger than normal number of people? A. Yes. And that was just by walking through Building 26 to get in. You could see the police cars from the entrance. [Testimony of non-member Elizabeth Rankey.]

. . .

Q. Had anything happened that led you to have concern about the safety of employee? A. Yes.

Q. Tell us about that. A. Various incidents of violence that occurred during that week. Incidents that occurred at the entrance ways to parking lots, the entrance ways to buildings. Reports that we received from employees that were concerned.

Q. Now, can you tell us a little about these reports from employees. Employees were reporting certain things that were happening? A. That threats and intimidations as they came in the doors. That their car was hit on the fender as they drove in the parking lot. That they had to wait in long lines for their car to get into the parking lot because the pickets were blocking the entrance ways.

Q. Were these employees who were working in the military department who were making these complaints? A. During the — Yes. In addition to that we had reports from other employees, too. [Testimony of K. Ross, NCR director of personnel.]

. . .

Q. Had you received any reports of any kind before making, in connection with things that were going on? A. Yes. And in going through the department and talking to various people there was considerable agitation and concern concerning the safety of the people. Some people were extremely anxious.

particularly that employees who were attempting to cross picket lines without union passes were likely targets of

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Q. Had any incidents occurred of any kind that were reported to you by these people? A. Various people had reported incidents in coming into work. Their cars had been scratched and beat on. From the vantage point in the building itself I had a personal opportunity of seeing a number of entrances where people were coming in and leaving the plant and some of the difficulties they seemed to be encountering.

Q. Did any employees make any report of any kind about telephone calls they had been receiving? A. I became aware of one telephone call that apparently was made to one of the persons of a threatening nature.

Q. Mr. Pierce, I think you testified that you had made observations yourself through a window of some difficulties on the picket line. Would you describe what you saw? A. Yes. . . . Rather large gatherings of people milling back and forth. Groups of people stepping in front of automobiles. Pickets. Raised arms and well-understood gestures. Various well-understood gestures as a matter of fact. . . . Pickets standing in front of cars seeking identification, trying to find out who is passing. I saw several incidents there of what I considered to be — Well, I am surprised that somebody didn't get hit by a car. I saw people having to jump out of the way of automobiles. Curses, Gestures. [Testimony of Ernest Pierce, NCR Military Division manager.]

. . .

Q. Now, the strike began on the 18th. And will you describe what you observed and the information you collected in the course of carrying out this assignment that Mr. Schaeffer had given you as to whether, as to the nature of the day-to-day operation of the strike by the union? A. Well, the strike started early, or the unauthorized portion of the strike started early in the morning of the 18th. And at that time thousands, probably one to two thousand persons poured out of some of the buildings. We have thirty-three separate buildings at the NCR complex. And each building houses a particular type of segment. So not all buildings were involved. But several of the buildings, the more impatient element, I would say, of the union, several thousand of them poured out and roamed the streets, up and down the streets, hollering in the windows. Trying to motion for other employees to come out and so forth. That continued well into the afternoon.

And it thinned down quite considerably except there were

physical attacks by the strikers.[9] The company decided, therefore, on November 22, not to permit any employee to

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roving groups of pickets still around the parking lots and entrances and so on and so forth, to one of the main parking lots.

And then on the 19th, the night of the 19th, Mr. Withrow, president of the union, sanctioned the strike. Apparently they had had an executive board meeting and sanctioned the strike.

Starting the next morning — They apparently had never had a strike before. And I think they were somewhat disorganized, plus the fact that they had quite a number of people that they could not control. And —

Q. By "they" you mean the union? The union leaders? A. The union had no control over them.

So the next morning, and throughout the morning, and every morning throughout that week when employees were coming to work there would be mass groups of pickets at practically every entrance that we had at the plant. And they particularly focused on K and Patterson Boulevard. This is the entrance near Building 26 and 29. This is one of the main entrances into the main parking lot. And at the entrance to Stewart Street and Old River Road, which is the entrance running between Building 29 and 26. And large groups would congregate from, I would say six-thirty in the morning until about shortly after eight o'clock. And they would stretch a line across these entrances.

We were having quite a bit of difficulty getting police cars out there to try to — The police at first were quite reluctant to get involved in it.

The only way the employees would get in was if the cars would back up maybe a half a block or block, back up, shall we say south on Petterson Boulevard, then we could occasionally get a Dayton City Policeman, and he normally sat on a median strip out on Patterson Boulevard, to come over. He would spread the line apart and then maybe wave about ten or fifteen cars in. But if an individual car came in, or tried to get in, then they had quite a lot of difficulty and some of them were turned away.

Now, I was out there from time to time checking around, talking to members of the guard force, together with Mr. Frost, who is the head of plant protection, and who is no longer with us, and observed this throughout the week. [Testimony of William Brafford, NCR attorney.]

[9] For example, Ernest Pierce, Manager of the Military Division, testified:

Q. Now, was there any particular situation on the 22nd that

work in the Military Division unless he had obtained a pass from the union.

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contributed to your calling Mr. Ross that day and asking for clarification? A. Well, if I recall correctly the 22nd was, the crowd in front of the Patterson Boulevard entrance was rather large. There were groups of people patrolling, shall we say, milling around the street area. I believe this was the day that there is evidence that there was a number of police cars that were there. It would seem to me to be an alarming situation.

. . .

Q. Well, I am looking at the 22nd. You said you called Mr. Ross and asked for clarification about whether or not people had to have passes. Now, why were you asking about passes particularly on that day? You had trouble I realize. But why did you call him about the pass? What did they have to do with the violence in other words? A. Well, the passes apparently is what people were using as essentially safe conduct through the picket lines.

NCR attorney William Brafford, who had been assigned by the company to maintain a close watch on the strikers' picket line activities in order to determine the necessity of obtaining an injunction, described a marked upsurge in the picket line disturbances that occurred on November 22:

On Friday morning in particular —

Q. Friday the what? A. Friday, the 22nd, there was a very large group there starting early in the morning. And they were checking passes and turning people away.

I went out close to the line on two or three occasions during the morning and observed what was going on. We had some guards out there with cameras. I was concerned from the point of view that I wanted the line photographed because I wanted to present this evidence to the judge.

Q. It had built up to the stage where you felt that it would be necessary to go to court? A. Well, yes. It was working up. I felt that throughout the week that we had to go into the court. It was just a question of when.

We were hoping that the union would be able to control the pickets. But it became obvious during the end of the week, and particularly on this one day. Every morning I came in, like I say, Mr. Swigert, every morning I came in they were asking for passes at every entrance. A lot of people didn't have to show them because if you got a group you could slide on by. But they were checking passes.

But this particular time—

The company's decision was communicated to the employees on the afternoon of November 22. They were told by their supervisors either to obtain a pass or to stay home for the duration of the strike. George Springer (a non-member of the EIU), Richard Hill (EIU member), Robert Petry (EIU member), and Lloyd Hill (non-member) did not have passes and, accordingly, were sent home by the company. Springer did not work for the duration of the strike; Richard Hill obtained a pass and worked during the strike period, as did Petry; Lloyd Hill, after the company's action, at first refused to obtain a pass but later changed his mind and worked during the last week of the strike. Edward Huesman, a non-member of the EIU and the charging party in this case, testified that he felt "coerced" by the company's action and therefore agreed to the wage contribution for the second and third weeks of the strike. Frederick Seeberg, Sandra Martes, Elmer Houston, and Donald Beam, all of whom were EIU members, testified that they renewed their passes at least in part because of the company's November 22 decision.

In sum, seven Military Division employees either did not work during the strike (the strike ended December 18, 1968) or worked only part of the time because of their refusal to accede to the union's contribution requirement. And, 133 Military Division employees contributed various sums to the EIU during the course of the strike.

On November 23, NCR obtained a temporary restraining order from an Ohio state court enjoining the EIU and its agents from interfering with the ingress and egress

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Q. What particular time? A. On the 22nd they had gotten even more overt about it and more insistent. And when I got there in the morning this entrance about sixty feet wide, the driveway, it was completely blocked, full of pickets. So this went on all day. A lot of people being turned away with cars. So late in the afternoon I went over there again. I got word,

of people and supplies at the NCR complex and limiting the number of pickets that could be maintained at the entrances to the complex. This order, however, did not immediately result in the cessation of the harassment and intimidation of employees who were crossing picket lines, and the company, at the end of the second week of the strike, sought a contempt citation against one of the ringleaders of the picket line incidents. Nevertheless, pass-checking continued, at least on a sporadic basis, until the strike ended.

When the passes were renewed at the beginning of each week, union officials asked the employees how many hours they had worked during the preceding week because NCR did not supply the union with work records. On Monday, December 16, rumors of an impending settlement of the strike began to circulate, and many employees did not renew their passes for that week and did not pay the assessment on the wages they had earned the preceding week. The union has not attempted to recover these sums.

II. THE NLRB'S CONCLUSIONS AND ORDER

The Trial Examiner held that the EIU violated section 8(b)(1)(A) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(b)(1)(A),[10] by en-

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Mr. Frost and I got word that they were continuing to turn people away that didn't have passes. And then I also received word that Mr. Withrow was at the picket line at Patterson, K and Patterson.

[10] Section 8(b)(1)(A) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

forcing the wage contribution, with respect to both members and non-members of the EIU, "by threats to prevent, and actual attempts physicaly to prevent, the employees from working." The EIU was held coercively to have conjoined the Military Division employees' jobs with their organizational rights and to have violated section 8(b) (1) (A) by coercing the employees not to refrain from engaging in concerted activity.

The Trial Examiner held that the company violated section 8(a) (1) of the NLRA, 29 U.S.C. § 158(a) (1),[11] in two respects. First, she held that NCR officials, when they learned of the contribution requirement, had an affirmative duty to take reasonable steps to protect the employees' right to work, such as: assuring employees that they could work without obtaining passes from the union; offering passes that would identify employees as members of the Military Division; and seeking a temporary restraining order prior to November 22 and taking other "lawful steps" to protect the employees. By failing to take such action to protect the employees, NCR was held to have interfered with their right to refrain from engaging in con-

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Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[11] Section 8(a)(1) provides:

> (a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

certed activity. Second, she held that NCR violated section 8(a)(1) on November 22 by taking the affirmative step of requiring Military Division employees to obtain passes from the union as a condition to their being permitted to continue working.

The Trial Examiner's recommended order required the EIU to cease and desist from conditioning the right of employees to go to work through a picket line upon their agreement to pay part of their wages to the union. The order also required the EIU to reimburse the 133 employees who made wage contributions to the union and to compensate for lost wages the seven employees who did not work during all or part of the strike. NCR was required to cease and desist from "[a]cquiescing in, adopting or enforcing" any requirement that its employees pay to the union a portion of their wages as a condition of their being allowed to work. Further, the order recommended that NCR be jointly and severally liable with the EIU for compensating the seven employees who did not work for varying periods during the strike and be secondarily liable for reimbursing the 133 employees who paid the union a portion of their wages. Both parties were required to post the usual notices.

The Board adopted the Trial Examiner's findings, conclusions, and recommendations in their entirety.[12] Both NCR and the EIU have petitioned for review, and they challenge not only the Board's conclusions concerning the commission of unfair labor practices but also the affirmative remedial provisions of the Board's order.

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[12] Member Fanning believed that NCR should be primarily liable for the seven back-pay awards since "it was Respondent Company's unlawful conduct of not allowing them to work without such pass that directly caused their failure to work."

III. THE SECTION 8(b)(1)(A) VIOLATION

Both the EIU and NCR argue forcefully that the union did not coerce the Military Division employees into signing the wage contribution agreement and that the union's decision to implement this procedure was permissible under the proviso to section 8(b)(1)(A), which protects a union's right "to prescribe its own rules with respect to the acquisition or retention of membership" in the union. For the reasons that follow, we reject these contentions.

The Supreme Court concluded in *NLRB* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175, 184-95 (1967), that section 8(a)(1)(A) was enacted primarily to control union conduct during organizational campaigns. More specifically, the section was found to have been designed " 'to protect employees in their freedom to decide whether or not they desire to join labor organizations, to prevent them from being restrained or coerced.' " *Allis-Chalmers, supra*, 388 U.S. at 188, quoting 93 Cong. Rec. 4435 (1947) (remarks of Senator Smith). When asked to describe union conduct that would violate the proposed section, Senator Taft "responded with examples of threats of bodily harm, economic coercion, and mass picketing in organizational campaigns and coercion which prevented employees not involved in a labor dispute from going to work." *Allis-Chalmers, supra*, 388 U.S. at 189.

In addition, the Court in *Allis-Chalmers* repeatedly emphasized the existence of a second theme running through the legislative debate on the proposed section 8(b)(1)(A), namely, the desir not to interfere with a union's regulation of its internal affairs. For example, Senator Ball, who proposed the amendment to the Taft-Hartley Act that became section 8(b)(1)(A), did not object to the later insertion of the membership-rule proviso into that section because, he stated, " 'It was never the intention of the spon-

sors of the pending amendment to interfere with the internal affairs or organization of unions.'" *Allis-Chalmers, supra*, 388 U.S. at 187, quoting 93 Cong. Rec. 4272 (1947) (remarks of Senator Ball). According to Senator Ball, then, the proviso did nothing more than to codify and make explicit the preexisting right of a union to prescribe reasonable rules intended to govern the relationship of its members to the union.

As the Supreme Court also recognized in *Allis-Chalmers*, crucial to this right of a union to maintain its organizational integrity is the power to carry on an effective strike:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . .
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> . . .
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> Integral to this federal policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."

388 U.S. at 180-81. Accordingly, the ability of a union to strike effectively, the Court observed, depends in large part on the power of a union to discipline its members

for engaging in strike-breaking activities. *Allis-Chalmers, supra*, 388 U.S. at 182-84.

These considerations persuaded the Court to hold in *Allis-Chalmers* that a union did not violate section 8 (b) (1) (A) in imposing fines on its members who crossed the union's picket line and went to work during a strike, and in bringing suit for the collection of these fines. This holding was based not upon the proviso to section 8 (b) (1) (A), but upon a conclusion that such disciplinary action did not constitute "restraint" or "coercion" within the meaning of that section. *See Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *NLRB*, 459 F.2d 1143, 1149-50 (D.C. Cir. 1972) (hereinafter *Booster Lodge 405*).

It is, therefore, clear that a union does not violate section 8 (b) (1) (A) by fining or otherwise reasonably disciplining members who elect to cross a picket line set up by the union in the course of an authorized strike. *See Booster Lodge 405, supra; NLRB* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 446 F.2d 369 (1st Cir. 1971), *cert. granted*, 405 U.S. 987 (1972) (No. 71-711); *Rocket Freight Lines Company* v. *NLRB*, 427 F.2d 202 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970). And it is clear that a union can seek external enforcement of its internal rules at least to the extent of utilizing the courts to collect fines. *Allis-Chalmers, supra.*

However, the Court in *Allis-Chalmers* was careful to emphasize the distinction between permitting a union's regulation of its internal affairs and enforcing "a union's internal regulations to affect a member's employment status." 338 U.S. at 195. Two years later, in *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969), the Court, relying also on the intervening decision in *NLRB* v. *Industrial Union of Marine*

& *Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968), incorporated this distinction into a broad standard against which union disciplinary actions are to be measured:

> [Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is *reasonably enforced against union members who are free to leave the union and escape the rule.* [Emphasis added.]

In formulating the third element of this test, the Court referred approvingly both to the Board's long-standing rule that section 8(b)(1)(A) proscribes "unacceptable methods of union coercion, such as physical violence to induce employees to join the union or to join in a strike," 394 U.S. at 428 n.4, and to its own previous holding that the policy of the NLRA is to " 'insulate employees' jobs from their organizational rights.' " 394 U.S. at 429 n.5, quoting *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954).

Petitioners contend that the union's conduct here did not violate the *Scofield* standards. NCR argues that the conditioning of the issuance of picket line passes on an agreement to contribute a percentage of wages earned during the strike was an internal rule adopted by the union that is protected by the proviso to section 8(b)(1)(A). It argues that the union did not have to permit its members to work during the strike and that, although nonmembers had the right to work if the company agreed to permit them to do so, the union had no obligation to give any of the Military Division employees "a free pass through the picket lines." The EIU emphasizes its right to maintain an effective picket line and argues that the "voluntary pledge program" was far less coercive than the

compulsory-fine system upheld by the Court in *Allis-Chalmers*.

We may assume, *arguendo*, that a union may inaugurate a voluntary contribution program and request members and non-members to pay a portion of the wages they earn during a strike as a donation to the union's strike effort, *see Youngstown Sheet & Tube Company*, 130 N.L.R.B. 1295 (1961). We may assume further than the union in such a case may legitimately decide not to suspend, with respect to its members who elect not to contribute, enforcement of an internal rule imposing a fine on members who cross a picket line during a strike. Nevertheless, factual determinations still must be made whether these union rules have been reasonably enforced, whether they have been applied only to union members, and whether they can be avoided by union members' electing to leave the union. *Scofield* v. *NLRB, supra*, 394 U.S. at 430. If the EIU physically prevented or threatened to prevent the Military Division employees from refraining from engaging in concerted activity, *i.e.*, forcibly prevented employees who did not sign the wage contribution agreement from crossing the picket line to work during the strike, then the EIU used "means unacceptable in themselves" (*Scofield* v. *NLRB, supra*, 394 U.S. at 430) to enforce an ostensibly internal rule. Such a finding could also be viewed as supporting a determination that the EIU linked the employees' jobs with their organizational rights by preventing those not in sympathy with the union from working. *See Scofield* v. *NLRB, supra*, 394 U.S. at 430-31.

Therefore, the question concerning the union's conduct, for purposes of this appeal, resolves itself into a determination whether the Trial Examiner's finding, which was adopted by the Board, that the union used acceptable means to prevent employees without passes from working is

supported by substantial evidence on the record considered as a whole. *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474 (1951); NLRA § 10(e), 29 U.S.C. § 160(e).

We believe that the testimony summarized in part I *supra* provides ample support for the Board's finding on this point. Initially, we observe that several employees were told by persons issuing passes at the union hall that they would have to sign the contribution agreements in order to work.[13] It is clear that, since the union delegated to these persons the job of issuing passes and soliciting wage contributions,[14] they were agents of the union for purposes of implementing the contribution program. Accordingly, the union is responsible for these union hall statements. *See International Longshoremen's & Warehousemen's Union, CIO, Local 6*, 179 N.L.R.B. 1487 (1948). And, even if the union did not specifically authorize the conditioning of the issuance of passes upon the signing of the contribution agreements, pass applicants could reasonably have believed that the imposition of this condition had been authorized. In such circumstances, the union cannot disavow responsibility. *See NLRB* v. *Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent*, 290 F.2d 99, 103 (2d Cir. 1961).

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[13] *See* note 4 *supra* and accompanying text.

[14] Union official Sturr testified:

> Q. Now, at the time this strike commenced were you assigned any particular duties? A. Shortly after the strike commenced I and several others were assigned the job of collecting moneys from those employees who were going to be permitted to work during the strike in certain places.
>
> Q. Who, besides you, was involved in collecting those contributions? A. There were several. I would say Mr. Robbeloth, Mr. Barefoot, and myself. We three were probably more involved than anybody else on a time basis. Mr. Arnett was in on it, too.

Although a union threat that employees who did not agree to contribute would not be allowed to work might not, without more, violate section 8 (b) (1) (A), *see Youngstown Sheet & Tube Company, supra,* the record in this case indicates that this threat was made more ominous by the occurrence of other events.

For example, George Springer, in the company of three or four other Military Division employees, was told at the union hall by a union agent that he was required to sign the contribution agreement in order to work and that there were "going to be some pretty big boys on that picket line." Springer and the employees with him could reasonably have been expected to believe that the union agent was expressing the position of the union on this question and that he would be physically prevented from working if he did not obtain a pass.

More important than the isolated Springer incident however, is the congruence of the union agents' statements concerning the pass requirement with the mass picketing and pass-checking that occurred at most of the entrances to NCR's premises during the first week of the strike and at least "sporadically" thereafter until the end of the strike. At the hearing below, there was uncontradicted testimony concerning threats, intimidation, incidents of violence, and the blocking of ingress and egress by large groups of pickets who were attempting to ascertain which employees had obtained passes from the union. That such conduct is "coercive" within the meaning of section 8 (b) (1) (A) is beyond dispute. *See NLRB* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 362 U.S. 274, 290 (1960); *NLRB* v. *United Mine Workers of America,* 429 F.2d 141, 146 (3d Cir. 1970). And, that such conduct, when utilized by a union to en-

force its internal regulation of membership rights and responsibilities, constitutes "unacceptable means" and is "coercive" within the meaning of section 8 (b) (1) (A) is similarly clear. *Scofield, supra,* 394 U.S. at 428, 430; *Allis-Chalmers, supra,* 388 U.S. at 186, 189, 195.

Petitioners contend, however, that there is not substantial evidence that the union sponsored or encouraged the violence and pass-checking. They point, for example, to the testimony of NCR attorney Brafford that the union could not control the picketers, and to the testimony of union officer Sturr that the union and the individual employees were disorganized and did not seem to know how to conduct a strike or what to expect on the picket line. It is also argued that there is no direct testimony of any intimidation on the picket lines aimed specifically at non-pass-carrying Military Division employees; that, indeed, many of these employees testified that they were not checked for passes and that there was no picketing at their particular plant entrance. Finally, petitioners observe that the union relied on the honesty of the employees in collecting the wage contributions and that many employees did not make a contribution for the last week of the strike even though they had received passes for that week.

Although the union may not have actively sponsored the picket line incidents, it was in a position to and did reap the benefits inevitably flowing therefrom with respect to enforcement of the contribution program. Union officials admitted at the hearing that the pass requirement was adopted, at least in part, to appease the membership and to avoid violence on the picket line.[15] By the evening of November 19, there had already been reports of incidents involving roving bands of pickets. The incidents that oc-

[15] *See* note 2 *supra.*

curred throughout the rest of the week, therefore, could not have come as a complete surprise to the union leadership. It was in these circumstances that union agents told employees that they would have to obtain a pass in order to work.

Further, the union made no effort to disavow either the union hall statements of its agents or the picket line incidents. For example, union officer Robbeleth admitted that he overheard the union hall remark made by a union man to George Springer, but he did not attempt to repudiate it. More important, the union apparently made no attempt to restrain the pickets from intimidating or obstructing the passage of employees who were attempting to cross the picket lines, even though it is conceded that union officers were present at various times on the lines. The union thus implemented a contribution requirement with full knowledge that picket line activities would tend to reinforce the impression fostered by its agents that obtaining a pass was a necessary condition to being allowed to work. The union's "silent approbation" of this conduct amounted to a utilization of unacceptable means to enforce its requirement that employees pay for the privilege of exercising their section 7 right to cross the picket lines. *See NLRB* v. *Bulletin Company,* 443 F.2d 863, 866-67 (3d Cir. 1971), *cert. denied, sub nom. Philadelphia Newspaper Printing Pressmen's Union Local No. 16* v. *NLRB,* 404 U.S. 1018 (1972).

It is no answer to say that not all the Military Division employees were checked for passes or that some were able to work without passes. For one thing, a violation of section 8(b)(1)(A) can be found even when the coercion does not prove effective. *See NLRB* v. *United Mine Workers of America, supra,* 429 F.2d at 146; *Local 542, International Union of Operating Engineers, AFL-CIO* v.

NLRB, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964). For another, many of the employees who testified below indicated that they fully believed that obtaining a pass was necessary in order to work.[16] In fact, Robert Petry testified that after signing the contribution agreement, he tore up the agreement and went to work without a pass after discovering that there were no pickets at his work entrance. This indicates, of course, that when he obtained a pass, he fully expected to confront pickets at the plant who would require him to show it before he would be permitted to work.

The foregoing, we believe, clearly shows that the union utilized "unacceptable means" within the meaning of the *Scofield* test to enforce its contribution program. Not only does the uncontradicted evidence establish that the union employed threats of violence to assure compliance with the program, but it also demonstrates that no EIU member could escape the ostensibly internal rule by leaving the union because even non-members of the EIU were subjected to the union's coercion. Moreover, the physical coercion of the employees effected an interference with their employment status, and this linking of jobs with organizational rights is similarly proscribed under the *Scofield* test.

We hold, therefore, that substantial evidence on the record considered as a whole supports the Board's determination that the EIU violated section 8(b)(1)(A) by conditioning the right of employees to cross a picket line upon the payment of a wage contribution to the union.

IV. THE SECTION 8(a)(1) VIOLATION

We recognize, at the outset, that NCR was under no

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[16] *See* notes 3-6 *supra*.

obligation to allow any of its employees to work during the strike. However, NCR did elect to maintain the operations of its Military Division, and it invited all the employees of that division to work. In such circumstances, as respondent observes, an employer must offer the work available on an equal basis to all employees of the division selected by the company to operate during the strike. Employer discrimination between employees on the basis of activities protected under section 7 of the NLRA ordinarily will be a violation of section 8 (a) (1) of the Act, 29 U.S.C. § 158 (a) (1), and often of section 8 (a) (3), 29 U.S.C. § 158 (a) (3). *See, e.g., NLRB* v. *Anchorage Businessmen's Association,* 289 F.2d 619 (9th Cir. 1961).

By enforcing the EIU's unlawful pass requirement, NCR discriminated against those employees who had exercised or might have wished to exercise their section 7 right to refrain from engaging in concerted activity by coming to work without a pass. By thus discriminating, NCR prima facie violated section 8 (a) (1).

It is undisputed, however, that NCR took this affirmative step only because it feared for the safety of its employees. It had no anti-union animus, no desire to encourage membership in the union, and no motivation to interfere with protected activity. The company contends, therefore, that it was justified in acquiescing in and enforcing the pass requirement because its interference with its employees' protected activity was outweighed by its legitimate interest in safeguarding its employees' welfare and in cooperating with the United States Government.

Although this argument has some appeal, authority requires us to reject it.

An employer may have a business justification sufficient to excuse his interfefence with his employees' protected activity. *Textile Workers Union of America* v. *Darlington*

Manufacturing Company, 380 U.S. 263, 269 (1965). And, although it has been held that the absence of an anti-union animus does not of itself afford a defense to an employer's interference with protected activity, *NLRB* v. *Burnup & Sims, Inc.,* 379 U.S. 21, 23 (1964), and that "it is the tendency of an employer's conduct to interfere with the rights of his employees protected by Section 8 (a) (1), rather than his motives, that is controlling." *Welch Scientific Company* v. *NLRB,* 340 F.2d 199, 203 (2d Cir. 1965); *see also NLRB* v. *Hudson Motor Car Company,* 128 F.2d 528, 533 (6th Cir. 1942), in the absence of proof of an unlawful motivation, an employer may interfere with protected activity without violating section 8 (a) (1) unless the employer's conduct "is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends." *NLRB* v. *Brown,* 380 U.S. 278, 282, (1965); *see American Ship Building Company* v. *NLRB,* 380 U.S. 300, 308-09 (1965); *but see American Ship Building, supra,* 380 U.S. at 339 (Goldberg, J., concurring). *See generally* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 Yale L.J. 1269 (1968). Of course, the *Brown* and *American Ship Building* test may be merely another way of phrasing the balancing test enunciated in *Darlington* — that is, if an employer's conduct significantly interferes with protected rights and there is no legitimate business justification for this conduct, unlawful motive may be inferred: there could be no other reason for the employer to have taken such action. In such a situation, there is no need to inquire into motive and no need to balance competing rights. If the employer acts in good faith but mistakenly assumes that his conduct does not infringe on protected activity, as in *Burnup & Sims, supra,*

the employer will be held to have interfered with protected rights without a sufficient business justification, and the absence of an improper motive will not exculpate him from a violation of section 8 (a) (1). Here, too, there is no need to balance competing rights. Finally, if the employer acts in good faith and for legitimate business reasons, then it appears that under both the *Darlington* and the *Brown* formulations, his conduct will not violate section 8 (a) (1) unless the interference with employee rights is so severe as to outweigh employer interests. *See generally* Christensen & Svanoe, *supra.*

Therefore, in a real sense, employer good faith or lack of unlawful motive is not a defense to a section 8 (a) (1) charge. Instead, the absence of improper motive is relevant only to the extent it makes credible the asserted existence of legitimate business reasons for the employer's decision to take action that interferes with protected activity.

Applying these principles to NCR's asserted justification for interfering with its employees' fundamental statutory right to refrain from engaging in concerted activity, we hold that the Board correctly determined that NCR violated section 8 (a) (1). We do not believe that the decision to require employees to obtain a pass because they might otherwise be subjecting themselves to danger on the picket line is the kind of justification envisioned by the Court under the test outlined above. Although NCR's motivation here is commendable, and although, as an original proposition, it might be said that any decision made by an employer relative to the welfare of his employees is a "business" decision, the statutory labor relations scheme does not contemplate reserving this type of decision to the employer.

We are not here concerned with an employer's use of

economic weapons against a union, as in *Brown* or *American Ship Building, supra,* or with an employer's right to maintain his premises in an orderly fashion and to discharge disruptive or violent employees, as in *Burnup & Sims, supra,* or with inherently managerial prerogatives, as in *Darlington, supra.* These are the kinds of interests that justify the Board's or a court's determination that section 8 (a) (1) is not an absolute. These are the kinds of interests that justify a weighing of economic and statutory considerations in order to delineate the proper roles of labor and management in our industrial society.

We do not believe that the Congress intended, in formulating a delicately balanced national labor-management scheme, to assign to an employer the role of deciding for his employees how best to exercise their section 7 rights. It is not meet for an employer to tell his employees that, for their own good, they should (or should not) accede to pressures to engage in concerted activity. This paternalistic approach offends the philosophy embodied in the language of section 7. An employee must determine for himself whether he wishes to cross a picket line to work at the employer's invitation; the employer cannot condition this invitation, for whatever reason, on the employee's surrender of his section 7 rights.

We hold that the Board properly determined that NCR violated section 8 (a) (1) by requiring Military Division employees to obtain a pass from the union as a condition to being allowed to work. By thus acquiescing in and enforcing the union's unlawful demand, NCR engaged in conduct that was demonstrably destructive of employee rights and without the justification of serving important business ends.

Since this affirmative action by NCR occurred on November 22, and since the Board's order imposes both

secondary liability on NCR to reimburse all the wage contributions made by employees and joint and several liability for backpay of all employees who did not work for varying periods during the strike, we must determine whether NCR is liable for any wage contribution or loss of backpay that occurred prior to November 22. The Trial Examiner, affirmed by the Board, held that NCR had an affirmative duty to take reasonable steps to protect the employees' right to work, and that NCR's failure to take such steps prior to November 22 constituted an independent violation of section 8 (a) (1). We do not decide whether an employer has such a duty because we conclude that, in the circumstances of this case, the finding of the Board that NCR did not take reasonable measures is not supported by substantial evidence.

Between the evening of November 19, when the company first received reports of the wage contribution program, and the afternoon of November 22, when the company enforced the program, only two working days intervened. The testimony at the hearing below established that NCR officials, beginning on November 20, maintained a close surveillance of the situation at the company's gates to determine whether an injunction should be sought.[17] The testimony also establishes that the extent of the picket line coercion markedly increased on November 22, which prompted NCR officials to adopt the pass requirement and to seek an injunction the next day. We cannot say that this two-day delay was unreasonable. The company was justified in adopting a wait-and-see attitude on November 20 since it had no way of knowing whether the union would coerce employees to obtain passes. Since the company invited the employees to work regardless whether they agreed

[17] *See* note 9 *supra*.

to the wage contribution program, and since it in good faith deemed the picket line incidents controllable until November 22, it did not behave unreasonably in deferring application for a court order until November 23.[18]

Further, it is difficult to see what other effective affirmative steps the company could have taken. It did tell the employees, before November 22, that they could come to work without agreeing to the wage contribution. Whether the issuance of company passes to members of the Military Division would have been effective is doubtful on the state of this record. It appears unlikely that the possessor of a company pass who did not also have a union pass would have been immune from picket line harassment.

Accordingly, we hold that there is not substantial evidence on the record to support the Board's conclusion that NCR violated section 8(a)(1) prior to its adoption of the union's pass requirement. The uncontradicted evidence clearly demonstrates that NCR acted reasonably and properly until November 22.

V. THE REMEDY

NCR does not challenge the backpay award entered against it (except for its denial that it committed an unfair labor practice). The unfair labor practice that it committed clearly supports the entry of a backpay order to make "the employees whole for losses suffered on account of an unfair labor practice. *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). *See NLRB* v. *J. H. Rutter-Rex Manufacturing Co., Inc.*, 396 U.S. 258, 263 (1969); *NLRB*

[18] It is interesting to observe that, even after the restraining order was obtained, the company maintained the pass requirement. This suggests that NCR officials were not at all convinced that the court order effectively protected its employees.

v. *Nelson Manufacturing Company*, 326 F.2d 397 (6th Cir. 1964). However, we modify the Board's order by eliminating NCR's liability for wages lost prior to November 22 because we have determined that the company did not violate section 8(a)(1) before that date.

The EIU argues that, since under the Board's own rule, section 10(c) of the NLRA, 29 U.S.C. § 160(c),[19] does not authorize a backpay award against a union when the union has interfered with an employee's ingress to his job site but has not caused a termination or disruption of his employment status, it should not be made jointly liable with NCR for backpay. *See United Automobile Workers* v. *Russell*, 356 U.S. 634, 641 n.5 (1958); *Progressive Mine Workers of America, International Union* v. *NLRB*, 187 F.2d 298, 306-07 (7th Cir. 1951); *International Union of Operating Engineers, Local 513*, 145 N.L.R.B. 554, 555-56 (1963); *Colonial Hardwood Flooring Company*, 84 N.L.R.B. 563, 565-66 (1949). The Board contends that this rule is inapplicable here since it was the union's conduct in coercing the Military Division employees to obtain passes that caused the company to discriminate against them. Thus, the Board argues, the union was responsible "in a real sense" for the interference with the employmnt relationship.

Assuming, without deciding, the validity of the Board's

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[19] Section 10(c) provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall . . . take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

Colonial Hardwood doctrine,[20] we agree with the Board that the rule is inapplicable in this case, and that it is not necessary for a union to be found in violation of section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2),[21] for a backpay order to issue against it. We begin with the specific language of section 10(c): the Board may require backpay "of the labor organization . . . responsible for the discrimination . . . ." In interpreting and applying section 10(c), the Board has broad discretion, and when, in the exercise of this discretion, it "makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA].' " *NLRB* v. *Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 346-47 (1953), quoting *Virginia Electric & Power Company* v. *NLRB*, 319 U.S. 533, 540 (1943).

In *Colonial Hardwood*, the Board refused to order a union to make whole an employee who had been denied access by the union to his employer's plant. The Board reasoned that to order backpay in such circumstances

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[20] We observe that this rule appears to be inconsistent with the Court's discussion in *Scofield*, 394 U.S. at 428-31, of the impermissibility of the linking of jobs with organizational rights. *Cf. United Automobile Workers* v. *Russell*, 356 U.S. 634, 641 n. 5 (1958).

[21] Section 8(b)(2) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
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> . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership. . . .

would, in effect, compensate the employee for interference with his right of ingress to the plant, "as contrasted with compensation to him for losses in pay suffered by him *because of severance of or interference with the tenure or terms of the employment relationship between him and his employer* . . . ." 84 N.L.R.B. at 565 (emphasis added). In this case, by contrast, there was interference with the terms of the employees' employment relationship. The Military Division employees were sent home by NCR only because of the union's coercive conduct, and it can therefore be said that the employees' loss of wages would not have occurred but for the actions of the union. Given the union's but-for responsibility for the discriminatory conduct of the employer, it clearly was proper for the Board to effectuate the policy of the NLRA by requiring the union to join with the company in making the employees whole "for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB, supra.* Since "both the union and the employer may be, and normally are, held jointly and severally responsible for a wrongful discharge by the employer in response to the insistence of the union," *NLRB* v. *Lexington Electric Products Co.*, 283 F.2d 54, 57 (3d Cir. 1960), *cert. denied, sub nom. Local 3, International Brotherhood of Electrical Workers, AFL-CIO* v. *NLRB*, 365 U.S. 845 (1961), we see no reason to absolve the union when an employer acts unilaterally to discriminate in reaction to union pressure but in the absence of a specific union request. Apropos, we believe, in this context is this statement of the First Circuit in *NLRB* v. *Puerto Rico S.S. Ass'n.*, 211 F.2d 274, 276-77 (1st Cir. 1954):

> Both the employers and the unions have done acts which brought about the discrimination, and thus have each been guilty of unfair labor practices; and so far

> as liability is concerned, it is no matter that the employer-respondents may have committed the unlawful discrimination in response to coercive tactics by the unions. . . . Where, as in the present case, a consolidated complaint was issued both against the offending employers and the offending labor organizations, it is clearly within the broad discretionary power of the Board, in fashioning appropriate remedies, to make the liability for backpay joint and several . . . .

Here, there was clearly employed discrimination; there was clearly an interference in the employment status of the victims of this discrimination; and there was clearly union causation of the discrimination. In these circumstances, the Board did not abuse its discretion in ordering the EIU to be jointly and severally liable with NCR for backpay lost from November 22 to the end of the strike.

However, since the Board adheres to its *Colonial Hardwood* rule in this case, the EIU should not be liable for backpay lost prior to November 22 since it was not until that date that the company affirmatively enforced the union's pass requirement. There were apparently three employees who did not work prior to November 22 — Edward Dunn, Elmer Houston, and Don Kesinger. Although we entertain doubts about the validity of the *Colonial Hardwood* rule in light of *Scofield*, we have no alternative to applying it here. The Board's order is therefore modified to exclude these three employees from the backpay award for the period preceding November 22.

Both NCR and the EIU attack the reimbursement provisions of the Board's order. Both contend primarily that there is no evidence of their having coerced any employee, a contention that we have rejectd. NCR argues additionally that this award is punitiv rather than remedial since it has already paid the employees their full wages, and the

union, and not it, received the contributions. The EIU argues that the Board had the burden of proving that each employee for whom reimbursement was ordered contributed because of coercion. The union contends that

> [a]bsent specific evidence to the contrary, we must assume that at least the union members who did not testify, willingly and voluntarily made the contributions. To order reimbursement will provide them a windfall. These loyal union members would have made contributions regardless of the particulars of the arrangements.

We see no merit in these contentions.

We consider the validity of this award in light of the Supreme Court's observation that "[i]n fashioning its remedies under the broad provisions of § 10 (c) of the Act . . ., the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB* v. *Gissel Packing Company, Inc.*, 395 U.S. 575, 612 n.32 (1969). The Board has wide discretion in determining the scope of remedial action necessary to expunge the effects of unfair labor practices, *see Virginia Electric & Power Company* v. *NLRB, supra*, 319 U.S. at 542; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* v. *NLRB*, 427 F.2d 1330, 1333 (6th Cir. 1970); *Weltronic Company* v. *NLRB*, 419 F.2d 1120, 1123 (6th Cir. 1969), but any affirmative action ordered by the Board must be remedial rather than punitive in nature and must be limited to "removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* v. *NLRB*, 365 U.S. 651, 655 (1961);

Consolidated Edison Company v. *NLRB*, 305 U.S. 197, 236 (1938).

Accordingly, although it is settled that the Board, in the exercise of its informed discretion, may order an employer or a labor organization, or both, to reimburse employees for funds exacted as the direct result of coercive tactics prohibited by provisions of the NLRA, *see, e.g., Virginia Electric & Power Company* v. *NLRB, supra; NLRB* v. *SuCrest Corporation*, 409 F.2d 765 (2d Cir. 1969); *NLRB* v. *Wells*, 283 F.2d 689 (6th Cir. 1960); *NLRB* v. *Revere Metal Art Company*, 280 F.2d 96, 100-01 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); *NLRB* v. *General Drivers, Chauffeurs and Helpers, Local Union No. 886, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 264 F.2d 21, 23 (10th Cir. 1959), the Board cannot order reimbursement in the absence of proof that the funds would not have been paid but for the illegal coercion. *Local 60, Carpenters* v. *NLRB, supra; Morrison-Knudson Company* v. *NLRB*, 276 F.2d 63, 74-76 (9th Cir. 1960), *cert. denied, sub nom. NLRB* v. *Hod Carriers, Building and Common Laborers Union of America, Local No. 324, AFL-CIO*, 366 U.S. 910 (1961); *see Local 60, Carpenters* v. *NLRB, supra*, 365 U.S. at 657-58 (Harlan, J., concurring); *Virginia Electric & Power Company* v. *NLRB, supra*, 319 U.S. at 545 (Frankfurter, J., concurring); *Western Union Telegraph Company* v. *NLRB*, 113 F.2d 992, 997 (2d Cir. 1940). The Board does not have broad authority to impose sanctions solely for the purpose of deterring future violations of the Act. *Republic Steel Corporation* v. *NLRB*, 311 U.S. 7, 11-12 (1940).

With respect to the EIU's liability for reimbursement, then, two questions must be considered: is the remedy a reasonable, non-punitive measure that would "recreate

the conditions and relationships that would have been had there been no unfair labor practice" (*Local 60, Carpenters* v. *NLRB, supra,* 365 U.S. at 657 (Harlan, J., concurring)); and, if so, must the union reimburse those employees who were not shown specifically to have been coerced? We believe that both questions must be answered in the affirmative.

As we have previously observed, the bylaws of the EIU provided that any union member who crossed a picket line during an authorized EIU strike would be liable to a fine of $25 for each crossing. EIU officials, however, after being apprised of the Government's request that Military Division employees be permitted to work, decided not to utilize this bylaw and to issue picket line passes to the employees. Following the communication of this decision to NCR officials, the union leadership determined that it would request each Military Division employee to make a wage contribution. Had this request truly been precative, and had the contributions actually been voluntary, as the EIU contends, presumably passes would have been issued to employees who elected not to contribute, and those who were union members would not have been liable for a $25 fine for each picket line crossing.

By conditioning the issuance of picket line passes on payment of the wage contributions, however, the EIU deprived the Military Division employees of any free choice in the matter. Every employee in that division, whether union member or not, was deprived of his section 7 right to decide whether to accept the company's invitation to work without enriching the union's treasury. It is no answer to say that the union could have imposed a fine on its members who elected to work without obtaining union authorization. In the first place, the union suspended enforcement of the fine provision and has contended, both

in the proceedings below and in this court, that it merely sought voluntary contributions in lieu of a fine so that the Military Division could be kept in operation during the strike. Thus, members who contributed a portion of their wages contributed funds that, by the union's own admission, they could otherwise have retained. Second, even if the union had declared its intention to impose a fine on members who worked without contributing a third of their wages, these members had the section 7 right to resign from the union and thereby avoid subjecting themselves to the penalties prescribed by the union bylaws for crossing a picket line. *Booster Lodge 405, supra,* 459 F.2d at 1152-55; *District Lodge No. 99 and Lodge No. 2139, International Association of Machinists & Aerospace Workers, AFL-CIO,* 5 CCH Lab. L. Rep. (1972 CCH NLRB Dec.) ¶ 23,782 (1972); *but see NLRB* v. *Granite State Joint Board, supra; cf. Local 1255, International Association of Machinists & Aerospace Workers, AFL-CIO* v. *NLRB,* 40 U.S.L.W. 2632 (5th Cir. March 25, 1972). The union's illegal coercion, however, deprived its members this option. Indeed, in this case even non-members of the EIU were coerced into complying with the union's wage contribution program.

In the circumstances of this case, therefore, we conclude that reimbursement of the wage contributions is an appropriate means of erasing the effects of the union's unfair labor practice and thereby placing the employees in the position in which they would have been had there been no illegal conduct. The contributions were the direct result — in fact, the primary objective — of the unlawful coercion, and it would not be consistent to require the union to cease and desist exacting "contributions" and to permit it to retain funds thus illegally collected. Refunding these moneys is "a remedial measure in the compe-

tence of the Board to impose [since] there is support in the evidence that their [exaction] was induced, obtained, or retained in violation of the Act." *Local 60, Carpenters* v. *NLRB, supra,* 365 U.S. at 655-56. *See NLRB* v. *Cadillac Wire Corp.,* 290 F.2d 261, 263 (2d Cir. 1961).

We hold, moreover, that the Board properly ordered the EIU to reimburse all the Military Division employees. The evidence adduced at the hearing below demonstrated a pattern of widespread, indiscriminate pressure on the employees to agree to the wage contribution program, and the Board was entitled to infer from this, in the absence of testimony by specific witnesses that they paid voluntarily, that no employee freely chose to make the contribution. *See NLRB* v. *Link-Belt Company,* 311 U.S. 584, 588 (1941); *Sheraton-Kauai Corporation* v. *NLRB,* 429 F.2d 1352, 1357 (9th Cir. 1970); *NLRB* v. *Jan Power, Inc.,* 421 F.2d 1058, 1064 (9th Cir. 1970); *NLRB* v. *Revere Metal Art Company, supra,* 280 F.2d at 101. The union coercion was calculated to force the employees to pay, and the subsequent payments were thus foreseeable consequences of the union's conduct. *See NLRB* v. *General Drivers, Chauffeurs and Helpers, Local Union No. 886, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,* 264 F.2d 21, 23 (10th Cir. 1959). The burden should not be on the General Counsel, in such a case, to show that each employee was coerced; rather, once an initial showing of substantial and widespread coercion is made, it is incumbent on the union or employer, as the case may be, to come forward with evidence that specific employees were not coerced. Indeed, it has been held that threats made to a small number of a group of employees can support an order requiring reimbursement to all the employees in the group. *NLRB* v. *Teamsters and*

Allied Workers, Hawaii Local 996, 313 F.2d 655, 660-61 (9th Cir. 1963). As the court stated in that case:

> It would be a unique doctrine of law that would prevent the Board, if it is conviced by the evidence that, in the circumstances, an illegal threat of discharge made to one or several of a relatively small body of workmen had the effect of coercing others or all of the workmen in the group, from making a finding to that effect and basing an order on that finding. In the Board's appraisal of the problem, the circumstances would be of great importance.

313 F.2d at 660.

It may be that the reimbursement order will result in providing a windfall to "a lot of old-time union men" (*Morrision-Knudsen Company* v. *NLRB, supra,* 276 F.2d at 76) and that the Board should have explored means of determining which employees actually were coerced rather than uncritically adopted the proposals of the Trial Examiner. By the same token, the union was not justified in remaining silent in the face of testimony about the pervasive nature of the union's coercive tactics. By establishing on cross-examination of the General Counsel's witnesses the fact that some employees did not pay the wage contributions during the last full week of the strike, the union did nothing more than buttress the conclusion that the employees who paid during the strike did so because they felt coerced: they stopped paying when they believed that it was safe to do so. No employee testified that he made the payments freely and voluntarily. Even the few who indicated that they were able to pass through the gates without passes showed by their testimony that

their eventual decision to sign the contribution agreements resulted from union coercion.[22]

Accordingly, the Board acted well within its authority in ordering the union to reimburse all the employees. As Judge Learned Hand phrased it in an analogous context:

> However, as in our decision in National Labor Relations Board v. Revere Metal Art Co., 280 F.2d 96, 101, we will not direct the Board to make an inquiry in each case how far the employee was coerced. We there said: "Though the Board might have excluded the employees who had voluntarily signed union cards before September 1 from the reimbursement provision, it did not abuse its discretion in not doing so since these employees may well have remained in the union only because of the status it had unlawfully acquired. For the courts to require a determination of the attitude of each employee in every case would impose impossible administrative burdens."

NLRB v. *Cadillac Wire Corp., supra,* 290 F.2d at 263.

Completely without merit is the company's argument that the fastening of secondary liability on it amounts to a punitive measure because it has already paid the funds to the employees. We see no difference between the reimbursement order in this case and an order requiring an employer to reimburse employees for dues and initiation fees that were illegally checked off from the employees'

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[22] For example, Robert Petry (*see* note 7 *supra*) was eventually forced to pay because NCR, as the direct result of the EIU's coercive tactics, required it. EIU member Donald Beam testified that he signed the contribution agreement because his fellow employees were being forced to obtain union passes. He stated that "it wasn't right for some of us to come in and not those people. That would be just like a rat; to come in and have someone else denied the privilege of coming in."

wages. *See, e.g., NLRB* v. *SuCrest Corporation, supra; NLRB* v. *Revere Art Metal Company, supra.* In either situation, the employer may be required to pay twice if the union, which received the illegal exactions, does not return the money. The validity of the order is analyzed in terms of its effect on the employees — does it restore to the employees what they lost by reason of the unfair labor practice. In this case, "[b]y hypothesis the unlawful payment . . . was coerced, and the repayment of the whole amount merely put the employees in the same position they would have been in had the statute been obeyed." *NLRB* v. *Cadillac Wire Corp., supra,* 290 F.2d at 263. Moreover, NCR was made only secondarily liable for the reimbursement and will thus have to pay only if the union defaults. Given the relatively culpability of the parties, we believe that this was an appropriate exercise of the Board's discretion. *See NLRB* v. *Bulletin Company, supra; NLRB* v. *Revere Metal Art Company, supra,* 280 F.2d at 101.

However, since we have held that the company did not commit an unfair labor practice prior to November 22, its secondary liability for reimbursement will attach only with respect to wage contributions paid for that date and thereafter.

As modified by this opinion, the order of the Board is enforced.

EDWARDS, Circuit Judge, concurring in part and dissenting in part. The evidence of union coercion in this record which is quoted in the opinion of the court constitutes substantial evidence of an unfair labor practice and I concur in the enforcement of the NLRB order as to the union.

I do not, however, find substantial evidence of an unfair labor practice to support a major portion of the Board's order directed against the company. N.C.R. did of course agree with the government and the union to operate a unit which was producing military material. But there is no evidence of any complicity of N.C.R. in the union wage deduction scheme or the coercive union measures used to enforce it.

I would not enforce any portion of the Board order imposing secondary liability on the company for the union violations.

N.C.R. claims in effect that its decision not to put employees without union passes to work was based on sound business reasons. As to this, I find no evidence to the contrary. It is clear, however, that the refusal to put these employees to work did have a discriminatory effect whether it was intentional or not.

I would therefore modify the Board's order to require that N.C.R. make back wage payments only in the cases where it directly refused employment on the ground just referred to.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 71-1508

NCR EMPLOYEES' INDEPENDENT UNION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

(Filed September 19, 1972)

BEFORE: EDWARDS, CELEBREZZE, and McCREE, Circuit Judges.

The petition for rehearing having come on to be heard, upon consideration, it is ORDERED that the petition be, and hereby is, DENIED.

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

APPENDIX "B"

DECISION AND ORDER OF NLRB

(Filed June 1, 1971)

On February 18, 1970, Trial Examiner Fannie M. Boyls issued her Decision in the above-entitled proceeding, finding that Respondent Employer, The National Cash Register Company, and Respondent Union, N.C.R. Employees' Independent Union, had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision. Thereafter, the Respondents and the Charging Party filed exceptions to the Trial Examiner's Decision, and the Respondents filed supporting briefs. The Charging Party then filed answering briefs to the Respondents' exceptions and Respondent Union filed an answering brief to the Charging Party's exceptions. Respondent Union also filed a request for oral argument in response to which the Charging Party and the General Counsel filed memoranda in opposition.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the

case,[1] and hereby adopts the findings, conclusions, and recommendations[2] of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that Respondent Employer, The National Cash Register Company, its officers, agents, successors, and assigns, and Respondent Union, N. C. R. Employees' Independent Union, its officers, representatives, and agents, shall take the action set forth in the Trial Examiner's Recommended Order.[3]

Dated, Washington, D.C., May 28, 1971.

Edward B. Miller, Chairman
John H. Fanning, Member
Ralph E. Kennedy, Member
(Seal) National Labor Relations Board

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[1] Respondent Union's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[2] E. L. Huston, as his name appears in "Appendix A," was identified at the hearing as employee Elmer Houston.

[3] In footnote 16 of the Trial Examiner's Decision, substitute "20" for "10" days.

Member Fanning would make Respondent Company primarily liable and Respondent Union secondarily liable for the backpay owing to those employees named in paragraphs A,2 (a) and B,2(a) of the Recommended Order because the record demonstrates that those employees went to work without obtaining a picket line pass from the Respondent Union, as was their right, and it was Respondent Company's unlawful conduct of not allowing them to work without such pass that directly caused their failure to work.

APPENDIX "C"

TRIAL EXAMINER'S DECISION

(Filed February 18, 1970)

Statement of the Case

FANNIE M. BOYLS, Trial Examiner: This case, initiated by charges filed by Edward H. Huesman on May 5, 1969, against the National Cash Register Company, herein called NCR or Respondent Employer, and N.C.R. Employees' Independent Union, herein called the Union or Respondent Union, respectively, in a complaint issued against said Respondents on July 30, 1969, was tried before me on October 13 and 14, 1969, at Dayton, Ohio. The complaint, as amended at the hearing, alleges that Respondent Union violated Section 8 (b) (1) (A) and (2) of the Act by requiring all employees in the unit who worked during a strike to pay over to the Union a portion of the wages they earned and that Respondent Employer violated Section 8 (a) (1) and (3) of the Act by acquiescing in the Union's requirement and assisting it in its enforcement. Each Respondent filed an answer, denying that it had engaged in the unfair labor practices alleged. Subsequent to the hearing the General Counsel and the Respondent Employer filed a brief. The Charging Party filed a memorandum which I have treated as a brief insofar as it is based upon the facts shown in the record. The Respondent Union filed no brief.[1]

[1] The Trial Examiner is informed that Charles S. Bridge, counsel for Respondent Union, died subsequent to the time allotted for the filing of briefs.

Upon a consideration of the briefs and the entire record in this case and on the basis of my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent Employer

Respondent Employer is a Maryland corporation, engaged at Dayton, Ohio, in the manufacture of accounting machines, cash registers, adding machines and electronic equipment. During the year preceding the issuance of the complaint, which is a representative period, Respondent Employer had a direct outflow of its products, valued in excess of $50,000, which it sold and shipped from its plants in Dayton, Ohio, to places outside the State of Ohio. On the basis of these facts, which are admitted, I find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Respondent Union

Respondent Union is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices Alleged

A. *Issues Presented*

This novel case presents the issue whether a striking union which is willing to permit certain strategic workers in the bargaining unit to continue their work during the strike can lawfully require those workers — as a condition to being given passes permitting them to go through the picket lines to work — to agree to pay over to the Union a portion of their wages.

As will hereinafter appear, I have found that the Union violated Section 8 (b) (1) (A) of the Act by placing this condition on the right of employees, whether Union or nonunion, to work during the strike and that the employer has violated Section 8 (a) (1) of the Act by cooperating with the Union in enforcing this unlawful condition of employment.

As a part of the remedy for unlawfully depriving some employees of employment during the strike and unlawfully causing others to contribute part of their wages to the Union for the privilege of working, the Charging Party has requested that any sums of money ordered paid to make the employees whole shall bear interest at the rate of 8 percent per annum. For reasons hereinafter stated in the section entitled "The Remedy," this request has been denied.

B. *The Evidentiary Facts*

There is no substantial dispute regarding the relevant facts. NCR's operations in Dayton are carried on in a complex of 33 buildings and 2 or 3 satellite locations, where about 20,000 employees work. About 14,000 of these are in a bargaining unit represented by Respondent Union. During the Course of Contract negotiations between NCR and the Union, many of the employees on November 18, 1968, walked out on strike. This strike, though unauthorized in the beginning, was authorized by the Union on the night of November 18. No employees in the bargaining unit reported for work the next day.

A small portion of the work performed by NCR is pursuant to contracts with the United States Government in connection with defense projects.[2] Each of those contracts

[2] Only about 134 of NCR's approximately 14,000 employees in the bargaining unit work in the Military Division.

contains a provision requiring that NCR notify the Government of any actual or potential labor dispute which might delay the performance of the contract. On October 30, 1968, NCR, realizing that its inability to reach an agreement with Respondent Union on a new contract might result in a strike, gave the Government the notice required under its defense contracts. Following the receipt of this notice and before the commencement of the strike, representatives of the Government called upon representatives of NCR and the Union to request that Military Division personnel be permitted to continue working should a strike occur. Both NCR and the Union assured the Government representatives that each would cooperate to enable this type of work to continue.

On November 19, representatives of the Union and NCR met to implement their pledge that Military Division personnel continue their performance of defense work. It was agreed that th employees of that division would be requested to obtain a pass from the union hall in order to facilitate their passage through the picket lines without objections from the pickets.

Pursuant to this arrangement, supervisory personnel in the Military Division telephoned each employee under them that the Union had agreed that they could work during the strike and explained the arrangement for obtaining a pass from the union hall. Each employee was invited to report for work on the following morning. The Charging Party and other Military Division employees who reported to the union hall for their passes, however, were told by union representatives delegated to issue the passes or by other persons at the hall that in order to obtain a pass, each employee had to sign a document which recited:

> In recognition of the fact that I am being permitted by the NCR-EIU to work on my job at NCR during

> the period of time that an authorized strike is taking place, and further recognizing that the Union's Executive Board has recommended that voluntary contributions be accepted from all Union Members who are being permitted to work during this period, I hereby freely consent to pay one-third (33 1/3%) of my gross daily wages during this period, to the Union. In consideration of such contribution, it is my understanding that I am to be furnished authorization to cross the Union picket lines for the purpose of working at NCR during this period, and that I am obligated to obtain from the Union a new work authorization on or prior to Monday of each week, for the duration of the strike.

The decision that Military Division employees working during the strike would be required to agree to contribute to the Union one-third of their gross daily wages as a condition to receiving a pass was made by Union President Withrow and Union Secretary Taylor, and approved by the Union's Executive Board, prior to November 19 but no mention of this decision was made to any representative of Respondent Employer in arranging for the pass procedure. The purpose of requesting contributions from employees working during the strike, as explained by Taylor, was to help finance the strike and to appease members who might object to any employees passing through their picket lines.[3] These, substantially, were the reasons assigned to some of the Military Division employees by union agents requesting their signatures on the contribution forms as a condition to receiving passes.

As the contribution agreement form indicates and as was made clear to some of the employees protesting against

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[3] On June 18, 1968, the union members had voted to amend the Union's Constitution and By-laws to provide for a minimum fine of $25 for each time a member crossed the Union's picket line. This provision was not applied to any employee of the Military Division.

them to work during the strike unless they had passes and the Union would issue passes initally only to those who signed the forms and would renew the passes weekly thereafter only to those who paid to the Union one-third of their wages received during the preceding week. Statements made by union agents to some of the employees who protested against signing the forms leave little doubt as to the coercive nature of the Union's action. Thus, employee George R. Springer, who was not a union member and objected to signing the form, was told by a union agent dispensing the forms, "Well, the agreement between the Company and the Union is that you can go to work. But you are not going to work without this pass. And you won't get the pass unless you sign this paper." Springer replied, "Well, all I was interested in was what did the Company want," to which the union agent retorted: "Well don't worry about that. There are going to be some big boys on that picket line." The conversation between Springer and the union agent was heated and undoubtedly heard by other employees who were present in the crowded union hall for the purpose of seeking passes.[4]

Another nonmember of the Union, Huesman (the Charging Party) and employees in a group with him who protested against signing the form, were told by the union agents from whom they sought a pass that they had to sign the contribution agreement "to get the pass in order to work" but that the union agent did not care whether

[4] Robbeloth, one of the Union's officials, testified that he heard the remark about "big boys" being on the picket line but could not identify the person in the crowd who made the remark. Although Springer did not know the name of the person who was seeking his signature on the contriution agreement form and issuing passes, it is a fair inference and I find that such person was one of the union agents assigned to that task and that the Union is responsible for his representation to Springer.

they went to work or not and even preferred that they not work. Still another nonunion employee, Rankey, in seeking a pass from Union Agent Sturr on November 19, protested that she was not a union member and rebelled at having to pay the Union one-third of her wages. He replied that there were men on the picket line and since she was drawing a paycheck, she was "going to pay." Although protesting to Sturr that the requirement was "blackmail," she signed the contribution agreement form. Union Agent Robbeloth testified that after explaining to Military Division employees that the Union wanted to run the strike with a minimum amount of trouble or violence and that employees with passes would be recognized as doing their share in the strike effort by paying one-third of their wages into the strike fund, he told them that it was up to them "whether they worked or not."

It is a fair inference from Robbeloth's testimony and from the other evidence summarized above, that the Union meant to condition the right of the employees to work upon their agreement to make the contribution requested of them and that the employees in general understood that they would probably be physically prevented from crossing the picket lines to work if they did not agree to pay the price exacted for the pass.

The Union treated members and nonmembers alike in exacting the pledge of the one-third of their wages as the price of their right to work during the strike.[5] At least one employee, Don Kesinger, upon being told by his supervisor that the Union was asking the wage contribution "in return for the pass," did not seek the pass and did not work during the strike. A few other employees

[5] The Union was operating under a union security agreement but some employees under what union counsel described as a "grandfather clause," were not required to join and did not join the Union.

who worked in a building which was not being picketed, reported for work without passes during the first few days of the strike. In general, however, the employees did sign the contribution agreement form and worked for part or all of the duration of the strike, making the contribution required of them except with respect to wages received for the week beginning December 9 and the first 2 days of the following week. Word had reached employees about December 15 — before the time they had to make payments to receive renewed passes — that a bargaining agreement had been reached between the Union and Respondent Employer and that union members would vote on its ratification on December 17. Among the employees who testified, practically all assumed — correctly as it turned out -- that they would not be checked for passes on Monday and Tuesday, December 16 and 17, and could therefore work without making their contributions for the preceding week and receiving passes for the week beginning December 16.[6]

Let us turn now to the evidence regarding Respondent Employer's part in the implementation of the Union's plan.

As already indicated, at the time Respondent Employer notified Military Division employees to report to the union hall for passes, it did not know of the Union's intention to require the signing of the wage contribution agreement as a condition to receiving a pass. It learned of this requirement only when employees started calling their supervisors or Company officials and informing them

[6] The Union did not check the accuracy of the amounts tendered by the employees and had no company records from which it could have ascertained whether the employees were paying the agreed upon sums. The Union, moreover, has made no attempt subsequent to the termination of the strike on December 17 to collect the amounts which the employees had agreed, but failed, to pay.

of the condition. Company officials and supervisors assured the employees that it had not known of or agreed to this condition for the passes and told each employee who called that the decision was up to him as to whether he would sign the document and come to work.

When Respondent's personnel director, Ross, learned of the Union's requirement, he called Union Representatives Robbeloth and Sturr and protested that the requirement was a surprise to Ross and not a part of the agreement between NCR and the Union. The Union representatives explained to Ross, as they had explained to at least some of the Military Division employees, the Union's reasons for the requirement. During the next 2 days NCR management representatives received a number of reports of mass picketing, blocking of entrances and violence at some of the plant entrances where pickets were stopping employees and demanding to see their passes. Management representatives personally saw some of this violence.[7]

On Friday, November 22, employees of the Military Division were told by their supervisors that the Industrial Relations Department of NCR had decided that employees would no longer be permitted to work during the strike unless they had a union pass because NCR was afraid of possible violence. Employees without passes were told to get a pass or go home. Two employees, Springer and Lloyd Hill, who did not then have passes and expressed an unwillingness to pay the price for one, were sent home. Springer did not work for the remainder of the strike. Hill changed his mind about 2 weeks later, signed the wage contribution agreement and worked during the remainder of the strike. Others went to the union hall, signed the

[7] It is not clear from the record whether some non-Military Division employees were also attempting to work during the strike.

contribution agreement and worked for all or part of the remainder of the strike.

On November 23, the day after it sent home those employees who refused to obtain union passes, NCR sought and obtained from the Common Pleas Court a temporary restraining order which limited the number of pickets permitted at each entrance and forbade intimidation and harassment by the Union and its agents of persons seeking to enter or leave NCR property.

C. *Analysis and Conclusions*

1. Respondent Union's conduct

It is not unusual for unions to work out with management representatives arrangements whereby certain maintenance or other strategic services may be performed during a strike. This is sometimes done in the interest of both employees and employers to safeguard the plant property or preserve and maintain machinery and equipment so that employees may resume work without undue delay upon the termination of a strike. Such arrangements made primarily in the interest of the immediate parties to the labor dispute as well as those made primarily in the national or public interest are commendable and should be encouraged.[8] To the extent that a union agrees that any employees in the bargaining unit will be permitted to work during the strike with its blessings, it may weaken the collective strength of its members and enhance the

[8] Various means have been employed or advocated to accomplish this salutary objective of minimizing the harmful effects of strike action to the immediate parties involved as well as to the public. See, e.g., David B. McCalmont, "The Semi-Strike," *Industrial and Labor Relations Review*, Vol. 15, No. 2, January 1962; *United Steelworkers of America AFL-CIO*, and its *Local Union No. 586 (Inspiration Consolidated Copper Co.)*, 174 NLRB No. 34; *Youngstown Sheet and Tube Co.*, 130 NLRB 1295.

ability of the employer to withstand its demands. To offset this disadvantage to the Union, the latter in some instances has levied against those members it has willingly permitted to work during the strike an assessment to augment the strike fund. The levy of such assessments against Union members, collectible in the normal way in which assessments and fines are collectible, would not appear to be unlawful. *N.L.R.B.* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175; *Youngstown Sheet and Tube Co.*, 130 NLRB 1295.

Counsel for Respondent Union, in his opening statement at the hearing, asserted that the Union could lawfully have fined a member $25 for each time he crossed the picket line to work during the strike and that its requirement that those working during the strike agree to contribute to the Union one-third of their gross wages was surely a less severe means of treating those employees than fining them. Assuming that a $25 fine against union members would have been lawful, this is not to say that the less severe penalty, even if exacted only from its members, was legally permissible. The Supreme Court held in *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, that a full union member, who has voluntarily agreed to accept the obligations of union membership — as distinguished from an employee who pays his dues only because required to do so under a union security agreement — can lawfully be fined by his union for crossing a picket line during a strike even though court enforcement of the fine rather than expulsion from membership for nonpayment may be contemplated. Such union action would fall within the protection of the proviso to Section 8(b) (1) (A) which protects the union in its right to prescribe its own rules with respect to the acquisition or retention of membership therein. The Court in *Allis-Chal-*

mers, however, made clear, as it had done earlier in *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, that union action taken to discipline its members must be insulated from the employees' job rights (*Allis-Chalmers* at pages 185 and 206; *Radio Officers* at page 40).

We do not here have before us a case in which the Union has merely imposed a fine or assessment equivalent to one-third of the wages earned by the Union member while working during the strike, which fine or assessment is to be enforced through court proceedings or by expulsion from membership until the fine is paid. Indeed, we do not even have a fine or assessment confined to union members. The contribution sought by the Union was from union members and nonmembers alike. Provisions for enforcing it were not by the normal means but rather by threats to prevent, and actual attempts physically to prevent, the employees from working. Instead of seeking to insulate the employees' job rights from their organizational rights, Respondent Union was attempting to tie those rights together. As already pointed out, it was made clear to the employees by union representatives that they would have to obtain a pass in order to work and that they would not be issued a pass unless they signed the agreement to contribute to the Union one-third of their gross wages earned during the strike. That the Union's conduct was coercive cannot be questioned. Some employees, though protesting the Union's requirement, signed the agreement in order to perform work which they deemed it their duty to perform because of military needs or because they wanted to work. Others either refused to sign at all or did not sign until required by Respondent Employer to do so in order to continue working.[9] A few,

[9] The following seven employees either did not work at all or worked only part of the time during the strike because of the unlawful con-

who were not checked for passes or who worked in buildings not being picketed, were able to work during the first few days of the strike without passes, but following reports of increasing union violence and of a union resolve not to let anyone into the plants who did not display a pass, they, too, either ceased working or obtained passes.[10] To be sure, it was their employer's action on November 22, which was immediately responsible for the decision of the employees in the latter group. But their employer, I am convinced, took this position only because of the coercive pressures of the Union against the employees generally and in order to protect the employees from harm. Accordingly, the Union was responsible in a real sense for the actual coercion of all the employees in their right to refrain from engaging in a union activity and from assisting the Union. This constituted a violation of Section 8 (b) (1) (A) of the Act.

2. Respondent Employer's conduct

It is clear from the record that at the time Respondent Employer agreed with the Union on November 19 to have its Military Division employees drop by the union hall and pick up passes which would identify them as employees who would be working during the strike with the Union's approval, Respondent Employer had no knowledge of a decision by union officials to attach any condition to the issuance of the passes. No employee appears to have objected to going to the union hall for the purpose of picking up such a pass and there is no contention that

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dition imposed upon their right to work: George R. Springer, Elmer L. Houston, Don Kesinger, Lloyd K. Hill, Edward A. Dunn, Saundra Martes and Elizabeth Jane Rankey.

[10] George R. Springer, Richard D. Hill, Robert V. Petry, and Lloyd Hill.

the employer initially acted unlawfully when agreeing to a pass procedure.

The General Counsel contends, however, and I agree, that when Respondent Employer learned of the condition being placed by the Union upon the issuance of the passes, it had an affirmative duty to take reasonable steps designed to insure the employees that they could cross the picket line and work without having to pay a tribute to the Union for their exercise of that right. Respondent Employer did inform the employees who protested to it that the wage contribution agreement form which the Union was asking them to sign was no part of the pass procedure agreed to by the Company. Director of Personnel Ross also called Union Representatives Robbeloth and Sturr, expressed surprise at the Union's requirement and explained that he "didn't understand that there was anything like this involved." Respondent did not, however, assure its complaining employees that they could work without passes; it did not offer to issue to them passes of its own which would identify them as employees of the Military Division; nor did it prior to November 23, seek a temporary restraining order against Respondent Union or take any other lawful steps to protect its employees. Instead, until November 22, it merely informed them that the decision was theirs as to whether they should sign the contribution agreement and come to work.

In this case, unlike in *Youngstown Sheet and Tube Co.*, 130 NLRB 1295, which Respondent Employer has cited in its brief, the employees who were called upon to work during the strike had not unanimously agreed among themselves to make strike contributions. It is the fact that Respondent Employer, after becoming aware of the Union's condition and to objections by some of its employees, took no steps to assure them that they could work without

Union passes which made Respondent's conduct in this case vulnerable from the first day the Military Division operated following the strike. By failing to take reasonable steps to protect its employees against Respondent Union's coercive action against employees unwilling to contribute to its strike fund, Respondent itself was guilty of interference with, restraint and coercion of its employees in their right to refrain from engaging in union activities and assisting the Union. See *N.L.R.B.* v. *Goodyear Tire and Rubber Co.*, 129 F. 2d 661, 664 (C.A. 5); *J. P. Florio and Co., Inc.*, 118 NLRB 753, 756; *Warehouse and Distribution Workers Union, Local 207*, 118 NLRB 342, 344-347.

Regardless, however, of whether Respondent Employer's failure to act in protection of its employees' rights prior to November 22 is considered an unfair labor practice, it seems clear to me that Respondent Employer, on and after November 22, interfered with, restrained and coerced its employees in the exercise of their Section 7 rights when, with full knowledge of the unlawful condition placed by the Union on the issuance of passes, it took the affirmative step of expressly requiring all its Military Division employees to obtain passes from the Union as a condition of their continuing employment and sent those employees home who did not then have passes. *Whittleasea Blue Cab Co.*, 162 NLRB 106; *United Steelworkers of America, AFL-CIO*, and its *Local Union No. 586 (Inspiration Consolidated Copper Co.)*, 174 NLRB No. 34; *Florence Brooks*, 131 NLRB 756, enf'd as modified *sub nom. N.L.R.B.* v. *Food Fair Stores*, 307 F. 2d 3 (C.A. 3).

Respondent Employer, by thus cooperating with the Union in requiring the Military Division employees to pay the Union one-third of their gross earnings while working during the strike, manfestly volated Section 8 (a) (1) of

the Act. The General Counsel contends that Respondent Employer was also in violation of Section 8 (a) (3). The latter type of violation is not so clear. Respondent Employer's reason for capitulating to Respondent Union's requirement of wage contributions was undoubtedly, as it told the employees, its concern for their safety. It is doubtful that Respondent Employer's conduct, directed at union and nonunion employees alike, can be said to have necessarily had the effect of encouraging union membership or good union membership so that proof of such motive is not required. *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17. I need not and do not, however, decide this issue and the corollary issue as to whether the Union's conduct was in violation of Section 8 (b) (2) of the Act. for any remedial order would be the same regardless of whether one or more of the provisions of the statute were violated.

Conclusions of Law

1. Respondent Union, by conditioning the right of employees to go through picket lines to work upon the employees' agreement to pay part of their wages to Respondent Union, has restrained and coerced the employees of Respondent Employer in the exercise of their rights guaranteed under Section 7 of the Act, in violation of Section 8 (b) (1) (A) of the Act.

2. Respondent Employer, by at first acquiescing in Respondent Union's unlawful conditioning of the employees' right to work during the strike and later by expressly adopting and enforcing Resondent Union's unlawful conditioning of the employees' right to work, has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed under Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

It having been found that Respondent Union and Respondent Employer have violated the statute, my Recommended Order will require that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Since by November 20, 1968, when employees of the Military Division started to return to work, both Respondent Union and Respondent Employer were violating the statute in connection with the requirement that those employees contribute one-third of their wages to the Union, any remedy of this unfair labor practice should be the responsibility of both Respondents.

It having been found that seven of these employees (listed in footnote 9, *supra*) who wished to work during the strike failed to work at all or worked during only part of the strike because of their unwillingness to submit to the unlawful condition imposed upon them, my Recommended Order will require that Respondent Union and Respondent Employer jointly and severally make these employees whole for any losses of pay suffered by reason of the unlawful condition imposed upon their right to work during the period between November 20 and the termination of the strike on December 17, less any sums earnd by them at other employment during that period.

The record shows that 133 employees whose names are listed on General Counsel's Exhibit 2 contributed various sums of money in the amounts shown on that Exhibit totalling $15,351.45, to the Union during the strike pursuant to the unlawful wage contribution requirement. Since Respondent Union was the recipient of this sum, my

Recommended Order will require that Respondent Union shall be primarily responsible and Respondent Employer only secondarily responsible for making these employees whole for the amounts they unlawfully required such employees to pay.[11] The names of these employees and the amounts due them are listed in Appendix A to this decision.

The Charging Party has requested that, in the order to be issued, Respondents should be required to pay interest on the backpay and contributions monies for which they are liable at the rate of 8 percent per annum rather than at the 6 percent normally provided in Board orders. The General Counsel has requested that interest "shall be computed at a rate fully compatible with current interest rates which the employees were subjected to solely because of said discrimination" but has not named any specific rate at meeting this requirement.

In 1962 when the Board, in *Isis Plumbing & Heating Co.*, 138 NLRB 716, initiated the requirement that interest at the rate of 6 percent be allowed on backpay awards, it did not spell out its reasons for fixing that rate. At that time and now 6 percent was and is "clearly one hallowed by time" (*United States* v. *Philmac Manufacturing Co.*, 192 F. 2d 517, 519 (C.A. 3)). It is now and has been for many years the "legal" rate (that rate applicable in the absence of a contract fixing a different rate) in the District of Columbia, where the Board sits, as well as in a substantial majority of the 50 States.[12] It is the rate

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[11] *Makela Welding, Inc. and Kemp Welding, Inc.*, 159 NLRB 964, enf'd. as modified, 387 F. 2d 40 (C.A. 6); *N.L.R.B.* v. *Lexington Electric Products Co.*, 283 F. 2d 54, 57-58 (C.A. 3), cert. denied, 365 U.S. 845.

[12] The 1970 edition of the Martindale-Hubbell Law Directory shows 6 percent to be the legal rate in all but 11 of the 50 States, in-

fixed by statute for underpayments as well as overpayment of taxes to the United States Government (26 U.S.C., Secs. 6601a and 6611). A federal statute also provides that Federal District Courts may allow interest on their judgments at the rate permitted by the law of the State in which the judgment is rendered, which, in most instances, would be at 6 percent per annum (28 U.S.C., Sec. 1961).[13]

During the present period of rising interest rates, when a person might have to pay as much as 8 percent on a loan to tide him over his period of unemployment or when he might well be able to obtain that rate on his money, the Charging Party's request has some appeal.[14] If the employee is truly to be made whole for the loss of his wages, the amount of interest which his wages would have earned can arguably be counted as a part of the sum justly due him. Moreover, since the interest on backpay awards is not fixed by statute but appears, instead, to have been provided by the Board primarily as a means of attempting to compensate the employee for the loss of the use of his money (*Isis*, at pages 718, 720), I do not doubt the Board's legal authority to allow a rate which more accurately reflects the true loss to the employees.

Nevertheless, I question the administrative feasibility of any attempt by the Board to adjust the interest rates pro-

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cluding Ohio where the unfair labor practices here involved arose. In none is the legal rate as high as the 8 percent requested by the Charging Party.

[13] It has been pointed out, however, that this statute relating to interest recoverable on Federal District Court judgments has nothing to do with the question of whether prejudgment interest should be allowed as a part of compensation awarded to make the injured party whole. *Louisiana & Ark. Railway Co.* v. *Export Drum Co.*, 359 F. 2d 311, 316-317 (C.A. 5); *Montgomery Ward and Co.* v. *Collins Estate, Inc.*, 268 F. 2d 830 (C.A. 4).

[14] See *Federal Reserve Bulletin*, No. 1, Vol. 56, Jan. 1970.

vided on backpay awards to the fluctuating money market and, on balance, I do not believe it would effectuate the policies of the Act to attempt to make such an adjustment. In any event, I am convinced that no such change should be effectuated without careful consideration by the Board after the interested parties have had an opportunity fully to present their views. No such opportunity has yet been afforded the parties in this case. It is accordingly recommended that any monies due the employees here involved shall bear interest at the rate of 6 percent per annum, as provided in the *Isis* case.

RECOMMENDED ORDER

Upon the basis of the above findings of fact, conclusions of law, and the entire record in this case, and pursuant to 10 (c) of the National Labor Relations Act, as amended, it is hereby ordered that:

A. The Respondent Union, N.C.R. Employees' Independent Union, its representatives, agents, officers, successors and assigns, shall:

1. Cease and desist from:

(a) Conditioning the right of employees to go to work through a picket line upon their agreement to pay part of their wages to Respondent Union.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Employer, The National Cash Register Company, make whole the

following named employees for any loss of wages suffered by them between November 20 and December 18, 1968, by reason of Respondent Union's unlawful requirement that they pay it part of their wages for the privilege of working during the strike, in the manner set forth in the section herein entitled "The Remedy":

George R. Springer
Elmer L. Houston
Don Kesinger
Lloyd K. Hill
Edward A. Dunn
Saundra Martes
Elizabeth Jane Rankey

(b) Reimburse the 133 employees whose names are listed in "Appendix A," in the amounts shown in said Appendix, for the sums unlawfully collected from them as a condition of their right to work during the strike.

(c) Post in conspicuous places at its meeting hall and in any places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix B."[15] Copies of said notice, to be furnished by the Regional Director for Region 9, shall, after being duly

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[15] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that this Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by Respondent Union's representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(d) Post at the same places and under the same conditions as set forth above in (c) and as soon as they are provided by the Regional Director, copies of the Respondent Employer's notice marked "Appendix C."

(e) Mail to the Regional Director for Region 9, signed copies of Appendix B for posting by Respondent Employer as provided herein. Copies of said notice to be furnished by the Regional Director shall, after being signed by Respondent Union's representative, be forthwith returned to the Regional Director for disposition.

(f) Notify the Regional Director for Region 9 in writing within 20 days from the receipt of this Decision, what steps Respondent Union has taken to comply herewith.[16]

B. The Respondent Employer, The National Cash Register Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Acquiescing in, adopting or enforcing any requirement that employees who go to work for Respondent Employer through a picket line shall pay to Respondent Union a portion of their wages as a condition of their right to work during a strike.

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[16] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read; "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Union make whole the employees named in paragraph A2 (a) of this Order for any loss of wages suffered by them between November 20 and December 18, 1968, by reason of the unlawful requirement that they pay Respondent Union part of their wages for the privilege of working during the strike, in the manner set forth in the section herein entitled "The Remedy."

(b) If Respondent Union fails to do so, reimburse the 133 employees whose names are listed in Appendix A, in the amounts shown in said Appendix, for the sums unlawfully collected from them as a condition of their right to work during the strike.

(c) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll and other records necessary or helpful in analyzing the amount of backpay and other sums due under the terms of this Order.

(d) Post at its Dayton, Ohio, plants in conspicuous places where notices to employees are customarily posted, copies of the notice attached hereto marked "Appendix C."[17] Copies of such notice, to be furnished by the Regional Director for Region 9, shall, after being duly signed by Respondent Employer's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter

[17] See footnote 15, *supra*.

in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in (d) above and as soon as they are forwarded by the Regional Director, copies of Respondent Union's notice herein, marked "Appendix B."

(f) Mail to the Regional Director signed copies of "Appendix C" for posting by Respondent Union as provided herein. Copies of said notices to be furnished by the Regional Director shall, after being signed as provided above, be forthwith returned to the Regional Director for disposition.

(g) Notify the Regional Director for Region 9 in writing within 20 days from the receipt of this Order what steps Respondent Employer has taken to comply herewith.[18]

Dated at Washington, D. C.

/s/ Fannie M. Boyls
Fannie M. Boyls
Trial Examiner

APPENDIX A

Military Division employees and portions of their wages contributed to N.C.R. Employees' Independent Union:

Richard G. Chappel	128.48
Wayne Wright	90.74
Gene Straszheim	80.56

[18] *See* footnote 16, *supra*.

Donald Espy	77.38
Nolan Himes	125.86
Donald S. Canby	152.67
David Long	65.16
George E. Channell, Jr.	148.47
Charles Landerville	134.20
Darrel Byers	91.74
Earnest Middleton	231.19
Robert K. Johnson	153.58
Orris Smallwood	112.45
Anthony Mantia	138.60
Nelson E. Siders	136.27
Samuel Cook	238.68
James R. Taylor	212.96
Jack W. Williams	273.73
Jack B. Davis	240.73
Hugh B. Cramer	145.70
William Snyder	88.44
Clifford A. Young	88.74
Ned C. Graham	131.74
Jerry D. Rogers	114.97
Rosemary Cox	139.00
Marnorie M. Howell	156.16
Betty G. Rankey	49.09
Kenneth Thomas	71.17
Robert K. Staton	269.70
Kenneth K. Carmen	235.68
Foster L. Shelton	238.68
Jack N. Dalton	104.37
Thomas Sturr	11.08
Nancy L. Cunningham	135.41
Albert Simmons	80.39
Harold Channell	230.13
Joan Seeker	107.10

William Moyer	238.68
Ronald K. Stickelman	137.23
Howard E. Smith	173.87
Donald P. Moyer	104.06
Robert A. Keller	158.36
Nikolai T. Zavadsky	158.10
N. A. Mozechuk	23.76
Randall Whitlock	23.28
R. N. Beckman	175.71
Chester L. Frashier	201.80
L. W. Buchanan	230.18
Reinhold C. Schneider	204.23
Mary Lou Krohn	27.00
D. G. Dawson	175.62
Wahere E. Meyhofer	201.68
C. B. Dye	162.60
R. W. Lewis	158.40
J. R. Mustaine	185.87
William E. Davies	71.42
Daniel Goetz	193.96
S. N. Martes	23.84
R. J. Ratherman	181.42
Kenneth N. Allen	56.76
Clifford N. Clack	128.10
John D. Perkins, Jr.	43.16
James E. Thompson	186.88
Weldon A. Beverly, Jr.	186.88
David L. Handwerker	169.06
R. L. Schmitz	198.00
Jack L. Adams	96.37
Dennis M. Flanigan	174.94
James A. Denney	202.66
David R. Wisecup	137.87
Edward H. Huesman	155.33

L. D. Longstreth	204.64
H. A. Meyers	147.80
J. C. Wilson	158.13
R. V. Petry	139.33
J. L. Metchner	200.23
James L. Caupp	138.80
JoAnn (Thompson) Gluber	99.16
R. D. Hill	139.33
F. N. Seeberg	91.95
Paul S. Cummins	90.70
G. R. Schwallie	145.19
Don E. Beam	114.20
J. R. Gilliland	81.09
Marietta Elliott	145.06
E. L. Huston	42.00
Thomas Silcott	172.80
Evelyn S. Coleman	52.00
R. S. Hall	155.10
Roger Mears	52.80
Linda Rhoades	83.41
Jeanette Philipot	71.39
Anne E. Grabeman	27.56
Philemine Glover	28.62
Lina Fugate	50.00
John Banks	115.22
Virginia B. Hudson	21.38
J. D. Emery Miller	34.56
Maxine Wahl	41.53
Sarah E. Wilkins	59.02
James E. Cordray	72.74
Edward A. Dunn	147.34
M. L. Stockler	75.61
Gerald G. Hosbrook	106.63
George Matt	162.75

Michael Kraft	177.34
Donald L. Grier	98.16
Robert W. Bradford	79.47
R. A. Metzger	119.34
Ferne Hauser	35.00
Antonid Bishop	25.12
Walter Trimbach	8.89
Melba Zimmer	48.98
Dorothy Wright	58.93
Ambrose M. Rollins, Jr.	46.25
Dennis G. Peterman	50.00
Mary Bull	59.00
Thomas Medlar	55.10
Ilka Myers	54.92
Joyce Mussleman	76.59
Phyllis O'Keiffe	67.17
Mary N. McGloughlin	58.83
Frank Markunes	40.20
David Huddleson	55.68
L. K. Hill	104.30
J. B. Myers	72.13
Lanae Murrell	59.34
D. E. Wells	74.02
James L. Brown, Jr.	37.60
Lynda Michnik	33.86
Lawhita McCoy	27.38
Deborah S. Slater	16.70
George R. Weatherley	62.00

APPENDIX B
NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

WE WILL NOT condition the right of employees to go to work through a picket line upon their agreement to pay us part of their wages earned while working during a strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL, jointly and severally with Respondent Employer, The National Cash Register Company, make the seven employees named below whole for any loss of wages suffered by them while not working because of our requirement that they contribute to us a part of their wages for the right to work during the strike:

George R. Springer	Edward A. Dunn
Elmer L. Houston	Saundra Martes
Don Kesinger	Elizabeth Jane Rankey
Lloyd K. Hill	

WE WILL reimburse the 133 Military Division employees from whom we collected part of their wages during the November and December, 1968 strike as a condition to their right to work during that strike.

N.C.R. Employees' Independent Union
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. (513) 684-3686).

APPENDIX C

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT acquiesce in, adopt or enforce any union requirement that employees who go to work for us through a picket line pay to such union a portion of their wages as a condition of their right to work during a strike.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL, jointly and severally with Respondent Union, N.C.R. Employees' Independent Union, make

whole the seven employees named below for any loss of wages suffered by them while not working during the period when they were being required, as a condition of their employment, to contribute a portion of the wages they would have earned while working during the strike:

George R. Springer
Elmer L. Houston
Don Kesinger
Lloyd K. Hill
Edward A. Dunn
Saundra Martes
Elizabeth Jane Rankey

WE WILL, if Respondent Union does not do so, reimburse the 133 Military Division employees for the portion of their wages which they were required to pay Respondent Union for the right to work during the November and December 1968 strike.

The National Cash Register Company
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. (513) 684-3686).

APPENDIX D – STATUTES

NATIONAL LABOR RELATIONS ACT, AS AMENDED

Section 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

Sections 8(a)(1) and (3)

Sec. 8. (a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sections 8(b)(1)(A) and (2)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his rep-

resentatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 10(c)

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, that where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-879

NCR EMPLOYEES' INDEPENDENT UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18–61) is reported at 466 F. 2d 945. The Board's decision and order (Pet. App. 63–95) are reported at 190 NLRB No. 117.

JURISDICTION

The opinion of the court of appeals was filed on August 18, 1972; a petition for rehearing was denied on September 19, 1972 (Pet. App. 62); and the judgment of the court of appeals was entered on September 26, 1972. The petition for a writ of certiorari was filed on December 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

495-296—73

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union used physical intimidation and threats of violence to prevent employees without union passes from working during a strike.

2. Whether the Board properly required the union to reimburse those employees who made payments to the union for picket lines passes, and to pay lost wages to those employees who refused to make such payments and were prevented from working during the strike.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 96–98.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On November 18, 1968, when negotiations failed to produce a new contract, employees of National Cash Register's Dayton, Ohio, industrial complex went on strike, causing a virtual shut down of operations (Pet. App. 67; A. 49a–50a).[1] The next day, pursuant to assurances previously given to representatives of the federal government, the Company and petitioner ("the Union") met to arrange for employees in the Military Division, who were working on military defense projects, to continue work during the strike (Pet. App. 67–68; A. 150a–151a, 179a, 182a). It was

[1] "A." refers to the printed appendix used in the court below, a copy of which we are lodging with the Clerk of this Court.

agreed that the Military Division employees would be asked to obtain a pass from the union hall in order to facilitate their passage through the picket lines which the Union had set up at most entrances to the plants (Pet. App. 68; A. 145a, 151a). Company supervisory personnel then telephoned each employee in the Military Division and advised him of the arrangement (Pet. App. 68; A. 58a, 73a, 145a–146a, 151a–152a).

When Military Division employees reported to the union hall that evening for their passes, they were told by Union representatives that, in order to obtain a pass, each employee had to sign a document in which he agreed to pay to the Union one-third of his gross daily wages during the strike (Pet. App. 68; A. 58a–60a, 94a–95a).[2] The decision that the Military Division employees would be required to contribute to the Union in order to receive a pass was made by the Union without the knowledge or consent of the Company (Pet. App. 69; A. 145a, 146a, 151a, 168a).

[2] The document stated (Pet. App. 68; A. 187a):

"In recognition of the fact that I am being permitted by the NCR–EIU to work on my job at NCR during the period of time that an authorized strike is taking place, and further recognizing that the Union's Executive Board has recommended that voluntary contributions be accepted from all Union Members who are being permitted to work during this period, I hereby freely consent to pay one-third (33⅓%) of my gross daily wages during this period, to the Union. In consideration of such contribution, it is my understanding that I am to be furnished authorization to cross the Union picket lines for the purpose of working at NCR during this period, and that I am obligated to obtain from the union a new work authorization on or prior to Monday of each week, for the duration of the strike."

Employees who objected to the Union-imposed pass requirement were told that they had to sign "to get the pass and that they would not be able to cross the picket lines without a pass" (Pet. App. 70–71; A. 58a–60a, 65a). Thus, when employee George Springer, who was not a Union member, objected to signing the form, he was told by a Union agent dispensing the forms: "Well, the agreement between the Company and the Union is that you can go to work. But you are not going to work without this pass. And you won't get the pass unless you sign this paper" (Pet. App. 70; A. 74a–75a). After Springer replied, "Well, all I was interested in was what did the Company want," the Union agent, in the presence of other employees seeking passes, stated: "Well, don't worry about that. There are going to be some pretty big boys on that picket line" (Pet. App. 70; A. 75a, 81a–82a, 177a).

The Company learned of the pass conditions from complaining employees. It told them that the Company had neither known about nor agreed to the conditions, and that it was for each employee to decide whether he would sign the document and come to work (Pet. App. 72–73; A. 76a, 78a, 154a–156a).

The strike was accompanied by mass picketing at the plant entrances. Cars of employees attempting to enter were blocked at the gates, and some cars were damaged in the resulting back-up (Pet. App. 73; A. 147a–148a, 152a, 157a–158a, 161a–163a). Employees attempting to cross the picket lines were stopped and checked for passes (Pet. App. 73; A. 161a–163a).

By November 22, the mass picketing had become so unruly that the Company feared for the safety of employees attempting to enter the plant without passes (Pet. App. 73; A. 147a–148a, 152a–153a). It therefore informed the Military Division employees that they would not be permitted to work unless they obtained passes from the Union (Pet. App. 73; A. 79a–80a, 91a–92a, 99a–100a, 120a–121a, 124a). Employees who would not agree to the Union's terms ceased work for the remainder of the strike (Pet. App. 73–74; A. 71a, 77a–80a, 86a–88a).[3]

B. THE DECISIONS BELOW

The Board found that the Union violated Section 8(b)(1)(A) of the Act by threatening, and actually using, physical force to prevent employees from working who did not obtain a Union pass (Pet. App. 76–77, 80).[4] The Board stated (Pet. App. 76):

> We do not here have before us a case in which the Union has merely imposed a fine or assessment equivalent to one-third of the wages earned by the Union member while working during the strike, which fine or assessment is

[3] On November 23, the Company obtained, in the state courts, a temporary restraining order limiting the number of pickets at each entrance, and forbidding intimidation and harassment of persons seeking to enter or leave the Company's premises (Pet. App. 74; A. 164a–165a, 210a–212a). The Union's mass picketing activities continued despite the injunction (A. 165a–166a).

[4] The Board also found that the Company violated Section 8(a)(1) of the Act by acquiescing in the Union's pass requirement and by refusing, after November 25, to allow its employees to work without a pass (Pet. App. 79–80).

> to be enforced through court proceedings or by expulsion from membership until the fine is paid. Indeed, we do not even have a fine or assessment confined to union members. The contribution sought by the Union was from union members and nonmembers alike. Provisions for enforcing it were not by the normal means but rather by threats to prevent, and actual attempts physically to prevent, the employees from working. * * *

The Board ordered the Union and the Company, jointly and severally, to make whole for any loss of wages the employees who, as a result of the pass requirement, failed to work during the strike (Pet. App. 81). Further, the Board ordered the Union primarily, and the Company secondarily, to reimburse the employees for the sums of money collected by the Union as a condition of granting its pass (Pet. App. 81–82).

The court of appeals, with minor modifications, sustained the Board's findings and conclusions, and enforced its order (Pet. App. 18–61).

ARGUMENT

1. The first issue raised in the petition (Pet. 2)—whether a union may issue to employees "picket line passes in exchange for contributions to the union, where there is no union sponsored program of collection or enforcement by coercion or intimidation"—is not presented on this record. The court below expressly stated: "We may assume, *arguendo,* that a union may inaugurate a voluntary contribution program and request members and non-members to pay

a portion of the wages they earn during a strike as a donation to the union's strike effort" (Pet. App. 37). Here, however, the Board found, and the court agreed, that the Union had used physical force and other unacceptable means[5] to coerce cooperation with its pass system (Pet. App. 42).

The only issue actually presented, therefore, is whether the Board's factual finding is supported by substantial evidence. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, as shown by the Statement and by the opinion of the court below (Pet. App. 40–42), there is ample support in the record for the Board's finding that the Union used coercive means to enforce its pass system.

2. Similarly, petitioner's attack on the Board's reimbursement order (Pet. 3, 12–16) is based on the premise that the employees "voluntarily" made contributions to the Union in return for the pass, and that employees without passes were prevented from working as a result of the Company's "unilateral" action. The facts, however, as found by the Board and confirmed by the court below, are that the Union coerced the employees to make payments to it, and that "it was the union's conduct in coercing the Military Division employees to obtain passes that caused

[5] While a union may enforce a valid internal rule by such techniques as "fines, collected by threat of expulsion or judicial action," it may not resort to "means unacceptable in themselves, such as violence or employer discrimination." *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 430–431.

the company to discriminate against them" (Pet. App. 49). In these circumstances, the Board properly required the Union to reimburse the employees for the payments exacted from them, and for their lost wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973